(19,560.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1904.

## No. 460.

HIRAM REMINGTON, PLAINTIFF IN ERROR,

*vs.*

CENTRAL PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the northern district of New York, before you, or some of you, between Hiram Remington, plaintiff in error, and Central Pacific Railroad Company, defendant in error, wherein the jurisdiction of the court was and is in issue, a manifest error hath happened to the great damage of said Hiram Remington, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, on the 15th day of December, 1904, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 18th day of November in the year of our Lord one thousand nine hundred and four and of the Independence of the United States the one hundred and twenty-ninth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
*Clerk of the Circuit Court of the United States*
*for the Northern District of New York.*

1½ [Endorsed:] Supreme Court of the United States Law 3441 Hiram Remington, pl'ff in error, *vs.* Central Pacific Railroad Company, def't in error. Writ of error. Brown, Carlisle & Hugo, att'ys for plaintiff in error, # 8 Stone street, Watertown, N. Y. U. S. circuit court, N. D. of N. Y. Filed Nov. 18, 1904 W. S. Doolittle, clerk. D. C. N.

Received a true copy of the within writ of error for defendant in error. Dated this 18th day of November, 1904.

W. S. DOOLITTLE,
*Clerk of the Circuit Court of the U. S.*
*for the Northern District of New York.*

2 Supreme Court of the State of New York, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

To the honorable the supreme court of the State of New York:

The petition of the Central Pacific Railroad Company, appearing specially and for the sole and single purpose of presenting this petition respectfully showeth:

That heretofore and on or about the 10th day of April, 1903, the above entitled suit which is a suit of civil nature was brought in this court by Hiram Remington against your petitioner as defendant. That your petitioner, at the time of the commencement of said suit, was and has ever since been and still is a foreign corporation organized and created under the laws of the State of California, and at all such times was and still is a citizen and resident of the State of California and a non-resident of the State of New York.

That the plaintiff, at the time of the commencement of said suit, was and has ever since been and still is a citizen and resident of the State of New York.

That said suit is a suit of a civil nature in which there is a controversy between citizens of different States and that the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $2,000.

That said suit is pending undetermined in this court; and that the time has not yet arrived at which the defendant is required by the laws of the State of New York, or the rules of the supreme court of the State of New York, in which such suit is brought,
3 to answer or plead to the declaration or complaint of the plaintiff, and that no application has been made to any court or judge for the order to be applied for upon this petition.

Wherefore your petitioner prays for the removal of said suit into the circuit court of the United States, to be held in the district where such suit is pending, viz.: the circuit court of the United States in and for the northern district of New York, and makes and files with this petition a bond with good and sufficient surety for its entering in such circuit court on the first day of its next session, a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in such suit, if special bail was originally requisite therein, and your petitioner will ever pray, etc.

CENTRAL PACIFIC RAILROAD COMPANY, *Defendant.*
PURCELL, WALKER & BURNS,
*Attorneys for Defendant,* 15 *Washington St.,*
*Watertown, N. Y.*

STATE OF NEW YORK, } ss:
*Jefferson County,* }

Henry Purcell, being duly sworn, on oath says that he is one of the attorneys for the defendant in the above entitled cause and of the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

And affiant further says that the said petitioner is absent from and is a non-resident of the county of Jefferson, State of New York, in which said suit is brought, and that affiant makes this affidavit for the reason that the defendant is absent from and is a non-resident of the said county of Jefferson, in which said suit is brought, and none of its officers are within the said county.

HENRY PURCELL.

Sworn to before me this 26th day of October, 1903.

WATSON M. ROGERS, *J. S. C.*

[Endorsed:] Read on application, Oct. 26, 1903. W. M. R., J. S. C.

4 Supreme Court of the State of New York, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. }

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, a corporation duly authorized and existing under the laws of the State of Maryland, having an office at No. 35 Wall street, New York city, and having authority to transact business, pursuant to the act of Congress, August 13th, 1894, entitled, "An act relative to the cognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon," is held and firmly bound unto Hiram Remington, in the sum of five hundred dollars ($500.00), for the payment of which well and truly to be made unto the said Hiram Remington, his heirs, executors, administrators and assigns, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and firmly by these presents; upon condition nevertheless, that

Whereas, the above named Hiram Remington has heretofore brought a suit of a civil nature in the supreme court of the State of New York, in and for the county of Jefferson, against the said Central Pacific Railroad Company, and

Whereas, the said Central Pacific Railroad Company simultaneously with the filing of this bond intends to file its petition in the said suit in such State court for the removal of such suit into the circuit court of the United States in the district where such
5 suit is pending, to-wit: the circuit court of the United States in and for the northern district of New York, according to the provisions of the act of Congress in such case made and provided.

Now, therefore, the condition of this obligation is such that if the said petitioner, The Central Pacific Railroad Company, shall enter in the circuit court of the United States for the northern district of New York on the first day of its next session a copy of the record in such suit and shall well and truly pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto and shall also appear and enter special bail in such suit if special bail was originally requisite therein, then the above obligation shall be void but shall otherwise remain in full force and virtue.

In witness whereof, the said Fidelity and Deposit Company of Maryland has caused these presents to be signed by its vice-president and attested by its attorney-in-fact and its corporate seal to be hereunto affixed this 22nd day of October, in the year nineteen hundred and three.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By HENRY B. PLATT, *Vice-President.*
Attest: JAMES R. KINGSLEY,
*Attorney-in-fact.*

6 STATE OF NEW YORK, } ss:
*County of New York,* }

On the 22nd day of October, in the year 1903 before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the

board of directors, and in the presence of him the said Henry B. Platt.

JAMES T. CRANE,
*Notary Public, New York County.*

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"Resolved, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or Frank "H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood "and James R. Kingsley, attorneys-in-fact of this company, in the "State of New York, be, and each of them is, hereby authorized and "empowered to sign, execute and deliver any and all bonds or "undertakings for or on behalf of this company, and to attach "thereto the seal of the corporation, the same to be attested by the "said George Sewell Bonner, attorney of the company, or by
7 "either one of the other persons above named, as occasion "may require."

COUNTY OF NEW YORK, ss:

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 22nd day of October, 1903.

JAMES R. KINGSLEY,
*Attorney-in-fact.*

Fidelity and Deposit Company of Maryland.

*Statement, December 31st, 1902.*

| Resources. | | Liabilities. | |
|---|---|---|---|
| Real estate | $670,000.00 | Capital stock | $2,000,000.00 |
| Stocks and bonds | 2,723,100.00 | Surplus and undivided profits | 2,876,233.57 |
| Railroad bonds | 2,059,600.00 | Premium reserve | 717,297.87 |
| Net premiums due | 102,807.25 | Claims in process of adjustment | 31,012.45 |
| Cash in bank, etc | 235,058.63 | Claims reported | 166,021.99 |
| | $5,790,565.88 | | $5,790,565.88 |

STATE OF NEW YORK, }
*County of New York,* } ss:

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 22nd day of October, 1903.

JAMES T. CRANE,
*Notary Public, New York County.*

8 STATE OF NEW YORK, }
*County of New York,* } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that James T. Crane, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the county of New York, dwelling in the said county, commissioned and sworn, and duly authorizad to take the same. And further that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 22nd day of Oct., 1903.

[SEAL.] THOS. L. HAMILTON, *Clerk.*

(Endorsed:) New York supreme court, Jefferson county. Hiram Remington, plaintiff against Central Pacific Railroad Co., defendant. Bond. I hereby approve of the within bond as to form and sufficiency of surety. Dated Oct. 26, 1903. Watson M. Rogers, J. S. C. Fidelity and Deposit Company of Maryland 35 Wall street, New York.

9 STATE OF NEW YORK:

Supreme Court, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. }

On reading the affidavits of Hirman Remington, Frederick H. Remington and John N. Carlisle and certified copies of affidavits of

Ellis L. Aldrich and Andrew Hunter hereto annexed and on the application of the plaintiff, who desires to have the examination and deposition of himself taken in this action before the trial thereof, and it appearing that there are sufficient grounds therefor, and on motion of Brown, Carlisle & Hugo, attorneys for said plaintiff,

It is hereby ordered that the plaintiff Hiram Remington do appear before Mason M. Swan, Esq., an attorney and counsellor at law of the city of Watertown, New York, who is hereby appointed referee for the purpose of taking the examination of said Hirman Remington, at the residence of plaintiff Hiram Remington, No. 28 State street, at the southeast corner of State street and Park street, in the city of Watertown, Jefferson county, New York, on the 2nd day of November, 1903, at 10 o'clock in the forenoon of said day, for the purpose of being examined pursuant to the provisions of article I, title 3, chapter 9 of the Code of Civil Procedure.

It is further ordered that a copy of this order and of said affidavits be served upon the above-named defendant as follows: By service of a copy of said order and affidavits personally upon Purcell,
10 Walker & Burns, attorneys for the defendant, on or before the 27th day of October, 1903, and by depositing a copy of said order and affidavits properly enclosed in a postpaid wrapper, in the post office at Watertown, New York, or in any post office box regularly maintained by the Government of the United States and under the care of the post office at Watertown, New York, directed to the Central Pacific Railroad Company, at 120 Broadway, city of New York, New York, on or before the 22nd day of October, 1903, and also by depositing another copy of said order and affidavits, properly enclosed in a postpaid wrapper, in the post office at Watertown, New York, or in any post office box regularly maintained by the Government of the United States, and under the care of the post office at Watertown, N. Y., directed to the Central Pacific Railroad Company at No. 4 Montgomery street, San Francisco, California, on the 19th day of October, 1903.

Dated at the city of Watertown, N. Y. this 19th day of October, 1903.

(Signed) E. C. EMERSON,
*Jeff. Co. Judge.*

11 In Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

STATE OF NEW YORK, *Jefferson County,* } ss:

John N. Carlisle being duly sworn says he is one of the attorneys for the plaintiff in the above entitled action; that said action was

commenced by the service of a summons upon J. C. Stubbs, a director of the defendant on the 10th day of April, 1903; that defendant has appeared specially by Purcell, Walker & Burns, attorneys at law, residing and having an office in the city of Watertown, N. Y. and made a motion to set aside the service of the summons; that said motion was denied, and the said defendant has served notice of appeal from said order denying said motion to the appellate division, fourth department, which notice of appeal was served October 15, 1903.

Deponent further says that no previous application for an order to examine the plaintiff herein has been made.

JOHN N. CARLISLE.

Sworn to before me this 17th day of October, 1903.

MASON N. SWAN,
*Notary Public.*

12 STATE OF NEW YORK:

Supreme Court, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK, *Jefferson County,* } ss:

Hiram Remington, being duly sworn, on oath, deposes and says that he is the plaintiff in the above entitled action and that his place of residence is number 28 State street at the southeast corner of Park street and State street in the city of Watertown, Jefferson county, State of New York. That the above entitled action was commenced on the 10th day of April, 1903, by the above named plaintiff against the above named defendant Central Pacific Railroad Company by the service of the summons in said action upon the said defendant, and is now pending. That the defendant Central Pacific Railroad Company is, and at all times hereinafter mentioned was, a foreign railroad corporation duly created, organized and existing under and by virtue of the laws of the State of California, and owned and operated certain railroads. That the principal office of the said defendant Central Pacific Railroad Company is kept by the defendant at number 4 Montgomery street in the Southern Pacific building in the city of San Francisco, State of California. That said defendant Central Pacific Railroad Company also keeps
13 an office at number 120 Broadway, in the city of New York, in the State of New York, which office is also occupied by the Southern Pacific Company, a Kentucky corporation, Central Pacific Railway Company, a railroad corpora-

tion duly created, organized and existing under and by virtue of the laws of the State of Utah, and certain other railroad corporations whose roads have been leased or are controlled by the said Southern Pacific Company. That the said Central Pacific Railroad Company leased its various railroads to the said Southern Pacific Company and thereafter sold and conveyed said railroads to the said Central Pacific Railroad Company, and all of said companies have their offices in the city of New York at the same place. That the residence of said defendant Central Pacific Railroad Company is in the city of San Francisco, State of California. That the plaintiff has appeared in this action by Brown, Carlisle & Hugo, his attorneys, all of whom reside at the city of Watertown, New York, and whose office address is at number 8 Stone street in the city of Watertown, New York. That the defendant Central Pacific Railroad Company has not appeared in this action except as hereinafter stated.

That on the 11th day of May, 1903, Purcell, Walker & Burns, attorneys for the defendant, served a special notice of appearance in said action upon the plaintiff's said attorneys, of which Exhibit "A" hereto attached is a copy, which Exhibit "A" is made a part of this affidavit.

That on said 11th day of May, 1903, said Purcell, Walker & Burns, attorneys for the defendant, served a notice of motion
14 in said action upon the plaintiff's said attorneys of which Exhibit "B" hereto attached is a copy and is made a part of this affidavit.

That affiant is in doubt whether the fact that in said notice of motion the defendant moved "for such other or further order as may be proper" makes a general appearance in the action on the part of said defendant and for that reason attaches said notice of motion to this affidavit.

That said Purcell, Walker & Burns, defendant's attorneys, all reside at the city of Watertown, Jefferson county, New York, and their office address is number 15 Washington street, Watertown, New York.

That the complaint in said action has been prepared and verified by the plaintiff but has not been served upon the defendant or its attorneys for the reason that no demand for said complaint has been made by or on behalf of said defendant. That no answer has been served in said action.

That the nature of said action and the substance of said plaintiff's cause of action are as follows: That this action is brought for the purpose of recovering damages from the defendant Central Pacific Railroad Company amounting to $414,492.64 and interest thereon from the 10th day of April, 1903, besides the costs and disbursements of this action, which damages arise out of the following facts. That the said Central Pacific Railroad Company issued illegal and void certificates of the capital stock of said Central Pacific Railroad Company and made and caused to be published false and fraudulent representations concerning the capital stock represented by said certificates concern-

ing the affairs and financial condition of said Central Pacific Railroad Company, and concerning the consideration paid to said company for said stock, for the purpose of giving said capital stock represented by said certificates a fictitious value upon the market and for the
15 purpose of inducing the public to purchase said stock represented by said certificates, and issued said illegal, fraudulent and void certificates of stock in the city of New York, and published said false and fraudulent representations in the said city of New York. That the said illegal issue of certificates of capital stock amounted to $54,275,500. or thereabouts, for which the defendant received no consideration whatever. That the defendant, with the purpose and intent of deceiving the public and purchasers of said stock, concealed the fact that certificates for said stock had been issued without any consideration therefor having been received by the defendant, and with the purpose and intent of deceiving the public and purchasers of said stock and inducing them to believe that all of said stock issued by the defendant had been fully paid, caused the said stock to be entered upon the books of the defendant as fully paid stock and to be charged to the construction account and other accounts upon said books at par, as having been fully paid by construction and equipment of defendant's railroads.

That said defendant also declared certain illegal dividends upon its capital stock which had not been earned and which should have been applied upon its debts. That the said dividends so illegally declared and paid amounted between September 13, 1873, and August 1, 1880, inclusive, to the sum of $21,860,200. That nearly all this amount of illegal dividends was received by one Leland Stanford, one Collis P. Huntington, one Charles Crocker, one Mark Hopkins hereinafter mentioned and the estate of said Mark Hopkins upon stock of said defendant illegally issued as aforesaid, which had cost them nothing. That the defendant declared and paid said dividends with the following purpose and intent, to wit:

1st. To give the said dividends to said Stanford, Hunting-
16 ton, Crocker and Hopkins and the estate.

2d. To create a fictitious value for said stock upon the market and thereby enable said Stanford, Huntington, Crocker, Hopkins and his personal representatives to sell and dispose of the same at good prices and thereby cheat and defraud purchasers of said stock.

That said false and fraudulent representations were caused by the defendant to be published in a book entitled "Manual of the Railroads of the United States for 1880, by Henry V. Poor, 13th annual number, New York. H. V. & H. W. Poor, 19 Broad street;" that said book was copyrighted by H. V. and H. W. Poor and was published by them in the city of New York, State of New York, in the year 1880; that said manual is a manual of the railroads of the United States by Henry V. Poor which has been published annually by H. V. and H. W. Poor in said New York city since about the year 1868; that said manual has had at all times since its first pub-

lication a very high reputation for accuracy and reliability and at all times since its first publication has been generally used by stock brokers and stock purchasers and dealers for the purpose of obtaining information concerning the affairs and financial condition of the various railroads in the United States; that in the year 1880 the defendant furnished to the editor and publishers of said manual, with the purpose and intent that it should be published in said manual, and knowing that it would be so published, an article or report entitled "Central Pacific Railroad" which purported to contain a statement of the defendant's affairs and financial condition, and which among other things, contained the following:

"*General Balance, December* 31*st*, 1879.

| | |
|---|---|
| Railroad and appurtenances | $135,021,029.02 |
| Rolling stock | 8,030,468.77 |
| Real estate and buildings | 2,549,297.52 |
| Materials and fuel | 2,226,428.14 |
| Stocks and bonds | 982,184.68 |
| Bills receivable | 1,021,363.36 |
| Accounts | 5,423,693.89 |
| 17 Cash on hand | 540,966.76 |
| Sinking funds | 4,068,662.90 |
| Other property and assets | 1,489,644.82 |
| | $161,353,739.86 |

| | |
|---|---|
| Capital stock | 54,275,600.00 |
| Funded debt | 57,030,000.00 |
| Bills payable | 4,212,960.86 |
| Other liabilities | 1,131,605.39 |
| Current accounts | 1,465,455.00 |
| Profit and loss | 15,382,538.61 |
| U. S. subsidy bonds | 27,855,680.00 |
| | $161,353,739.86" |

That said report or article so furnished by the defendant was published in said manual for the year 1880, being the 13th annual number thereof, in said city of New York in said year; that the said balance sheet above set forth shows that there was a profit already made and on hand on December 31, 1879, of $15,382,538.61; that the said balance sheet was false and fraudulent in the following particulars:

1st. The said capital stock hereinbefore mentioned for which the defendant had received no consideration was included at par in the item "Railroad and appurtenances, $135,021,029.02," and also in the item "Capital stock, $54,275,500.00."

2d. On the 31st day of December, 1879, the defendant was owing to the Government of the United States the sum of $19,271,111.41 or thereabouts for accrued interest upon the Government loan of $27,855,680. of subsidy bonds, being interest on the same at the rate of six per cent. per annum from the respective dates of such bonds, which accrued interest had accumulated and remained entirely unpaid; that said item of $19,271,111.41 for accrued interest on the said Government loan of subsidy bonds was omitted entirely from said balance sheet and from said article published in said manual.

3d. Said balance sheet contained an item showing a profit of $15,382,538.61, to wit:—"Profit and loss $15,382,538.61," when there was, in fact, no profit but a loss. If the above item of accrued
18 interest had been included, it would have more than offset the said item of profit and shown a loss which should have appeared on the other side of the balance sheet. That similar false and fraudulent representations of the affairs and financial condition of the defendant were caused by the defendant, with a like intent, to be published in said manual in the numbers thereof published prior to 1880. That the defendant, with the purpose and intent of enabling the said stock to be sold and to cheat and defraud the purchasers of said stock, caused to be published annually in said "Poor's Manual," including said 13th annual number of said manual, as part of the statement concerning the financial affairs of the defendant, in each year after the declaration of the first of said dividends, the number, date, per centum and the amount of each of said dividends, which had been illegally declared and paid as aforesaid, prior to the several annual publications of said Poor's Manual.

That all of said transactions happened and were done by reason of a conspiracy between the defendant and one Leland Stanford, one Collis P. Huntington, one Mark Hopkins and one Charles Crocker, which persons were officers of the defendant, and the Contract and Finance Company, a California corporation, and others, entered into for the purpose of enabling said Stanford, Huntington, Crocker and Hopkins to acquire large amounts of illegal gains and profits and to enable them to sell said capital stock at good prices and to cheat and defraud the purchasers of said stock and those who subsequently dealt therein.

That at the times plaintiff purchased the stock hereinafter mentioned, he knew that the defendant had declared and paid the dividends hereinbefore mentioned, and had read the said statement concerning said dividends in said report or article contained
19 in said manual for 1880, and the plaintiff believed that the said dividends had been duly and legally declared and paid out of the surplus profits of the defendant; that at the times he purchased such stock, he knew that the said report or article and the said representations had been published in said manual for 1880 and had read said article and representations in said manual for 1880, being the 13th annual number, and at the time he so read said representations and at the times he purchased said stock, he be-

lieved that said article and said representations were in all respects true; that at the times he purchased said stock, he believed that all the stock and stock certificates issued by the defendant had been duly and legally issued and the said stock had been fully paid to the defendant, and that the defendant had received full consideration therefor; that at the times he purchased the said stock he did not know that the defendant was owing any accrued interest on said loan of United States subsidy bonds; that at the times he purchased the stock as hereinafter set forth he believed that the defendant on the 31st day of December, 1879, had profits on hand amounting to $15,382,538.61 as shown in said balance sheet published in said Poor's Manual in 1880 as aforesaid.

That in making the purchases of stock hereinafter mentioned, he relied upon and was induced thereto by said declaration and payment of said dividends; that in making said purchase of stock he relied upon and was induced thereto by said representations published as aforesaid in said Poor's Manual, 13th annual number, published in 1880; that in making said purchases of stock he relied upon said article and said balance sheet published in said Poor's Manual as aforesaid as showing the true financial condition of the defendant on the 31st day of December, 1879, and was induced by said article and particularly said balance sheet, to make said purchases; that in making said purchases of stock he relied upon all the stock and stock certificates issued by the defendant having been duly and legally issued, and having been fully paid to the defendant, and the defendant having received full consideration therefor, and was induced by the belief that such was the fact to make said purchases; that in making said purchases of stock he relied upon the defendant having on hand on the 31st day of December, 1879, profits amounting to $15,382,538.61, as shown by said balance sheet published as aforesaid, and was induced by the belief that such was the fact to make said purchases; and that he would not have purchased such stock or any thereof had he not believed, relied and been induced thereto as aforesaid.

That at various dates between the 22nd day of June, 1881, and the 28th day of May, 1883, inclusive, the plaintiff purchased various amounts of stock so illegally issued amounting to 3400 shares at various prices and paid various sums therefor, which amounted in all to $296,637.50, which purchases of said stock were made by him through the agency of others in the open market in the city of New York, State of New York, and said purchases were paid for by him at the times of said purchases in said city of New York, State of New York. That the said stock was not transferred to the plaintiff upon the books of the defendant but certificates representing said 3400 shares were assigned in blank to the defendant with blank powers of attorney authorizing the transfer of the same on the books of the defendant, which assignments and powers of attorney were executed by the persons to whom the said certificates had been issued by the defendant. That while said plaintiff held said stock, divers divi-

dends thereon were declared and paid by the defendant upon the presentation and surrender of certain dividend warrants attached to said certificates. That the defendant sold the said stock at divers times between the 2nd day of December, 1884, and the 2nd
21 day of April, 1885, inclusive, at divers prices and received therefor sums amounting to $107,712.50. That the said sales made by the defendant of said stock were made by him in the open stock market in the city of New York, State of New York. That the said purchases and sales of said stock were made at the market prices at the time of said respective purchases and sales.

That by the purchase and sale of said stock as aforesaid the plaintiff lost the sum of $188,925. and interest thereon from the 15th day of January, 1884, and interest on $14,150. from January 15, 1884, to December 2, 1884, on $3487.50 from January 15, 1884, to January 6, 1885, on $15,562.50 from January 15, 1884, to March 26, 1885, on $3212.50 from January 15, 1884, to March 27, 1885, on $9350. from January 15, 1884, to March 29, 1885, on $14,687.50 from January 15, 1884, to April 1, 1885, and on $47,262.50 from January 15, 1884, to April 2, 1885; that the said depreciation in the price of said capital stock was the result of the illegal acts and frauds of the defendant and the conspiracy hereinbefore set forth.

That by reason of the premises the plaintiff was damaged in the sum of $414,492.64 and interest thereon from the date of the commencement of this action, to wit, April 10, 1903. That the plaintiff did not discover the facts constituting the frauds hereinbefore set forth until in or about the month of December, 1902, and the defendant never made and never filed in the office of the secretary of state of the State of New York any designation of a person upon whom a summons could be served as provided in subdivision 2, section 432 of the Code of Civil Procedure or otherwise.

That the judgment demanded in this action is for the recovery from the defendant of the sum of $414,492.64 with interest thereon from the 10th day of April, 1903, and the costs and disbursements of this action.

22 That deponent has fully and fairly stated to his counsel John N. Carlisle, who resides in the city of Watertown, New York, and has an office at number 8 Stone street, Watertown, New York, the facts which he expects to prove by the testimony of himself as hereinafter stated, and that it is absolutely necessary for the prosecution of said action to take his testimony, and that his testimony is material and necessary for deponent in the prosecution of said action and without the benefit of the testimony of this deponent, he could not safely proceed to the trial of this action, as he is advised by his counsel after such statement made as aforesaid and as he verily believes. That the following facts and circumstances render the examination of this deponent material and necessary.

That a large part of said capital stock purchased by deponent as aforesaid, was purchased by him through the First National Bank of the City of New York, and a large part of said stock sold by him

as aforesaid was sold by him through said First national bank. That the books of account of said First National Bank of the City of New York, covering the period in which said purchases and sales of stock were made, have been destroyed, as affiant is informed and verily believes, and as will more fully appear by the affidavit of Frederick H. Remington, hereto attached. That by reason of the fact that said books of the First national bank have been destroyed as aforesaid, and by reason of the fact that said stock was not transferred to this deponent upon the books of the defendant, this deponent is the only person who can testify concerning the amounts of said stock purchased by him through said First national bank, concerning the dates of said purchases and the amounts paid for said stock; and this deponent is the only person who can testify concerning the amounts of said stock sold by him through said
23 First national bank, the dates of said sales and the amounts realized from said sales.

That a large part of the dividends received by the plaintiff as aforesaid, were collected for him from the defendant by the said First National Bank of the City of New York, and by reason of the fact of the said destruction of said books of said bank and from the fact that said stock was not transferred to the plaintiff upon the books of the defendant, this deponent is the only person who can testify concerning the dates and amounts of the said dividends so received by him.

That the testimony of this deponent is also material and necessary for the purpose of proving that before purchasing said stock, he read the said article concerning the Central Pacific railroad in said 13th annual number of said Poor's Manual. That he believed the said representations published in said manual and contained in said article to be true, and that he relied upon said representations in purchasing the said stock.

That the testimony of this deponent is also material and necessary for the purpose of proving that at the times of purchasing the said stock, he believed the said certificates representing the same to have been duly and legally issued and that the defendant had received full consideration therefor.

That the testimony of this deponent is also material and necessary for the purpose of proving that he did not know that on the 31st day of December, 1879, the defendant was owing any amount of accumulated interest on the subsidy bonds issued to the defendant by the United States, said date being the date of the said balance sheet contained in said article published in said Poor's Manual, and did not know that said balance sheet was false and fraudulent in containing the item "Profit and loss $15,382,538.61" and did not know that instead of making a profit, the road had sustained a loss at the date of said balance sheet, and that at the time he made the purchase of said stock, he believed that the said balance
24 sheet was in all respects true and that he relied upon said balance sheet in making the said purchase.

That the testimony of said deponent is also material and necessary for the purpose of proving that he knew that the said dividends had been declared by the defendant, and had read concerning the same in the said article, and that he believed at the times he made the said purchases of said stock that the said dividends had been duly and legally declared and did not know that the same should have been applied upon the debts owing by the defendant, and relied upon said dividends having been duly and legally declared out of the surplus profits earned by the defendant.

That the examination of this deponent is also material and necessary on account of the following facts and circumstances: That this deponent is eighty-seven years of age; that in the month of March, 1903, deponent had a severe attack of pneumonia lasting about four weeks; that in the summer of 1903, deponent had an attack of erysipelas in the face; that on account of deponent's age, his health is liable to suddenly fail and he may not be able to attend court at the time of the trial of this action or assessment of damages. That deponent's eyesight is very poor. That in order to testify concerning the amounts paid for said stock, the amounts received for the same and the amounts of dividends received and the dates relating to the same, it is necessary for deponent to refresh his memory from entries made by him in his books of account concerning said matters, and that if his eyesight should become any worse than it now is, it will be impossible for him to see such entries in said books. That if this action should not be tried within the life-time of deponent and should be revived by his personal representatives, his said personal representatives could not recover in said action without deponent's testimony. That deponent desires that said testimony or deposition of himself should be taken to be read on the trial of this action, or upon an assessment of damages by writ of inquiry, or upon a reference or otherwise in said action, or in any other action hereafter brought between the same parties or between any parties claiming under them, or either of them, as provided in section 881 of the Code of Civil Procedure.

Deponent further says that he has fully and fairly stated the facts in the above entitled action to his counsel John N. Carlisle, an attorney and counsellor of the supreme court, who resides at the city of Watertown, New York, and has an office at number 8 Stone street at the city of Watertown, New York, and that he has a good and substantial cause of action against the defendant as he is advised by said counsel after said statement made as aforesaid, and as he verily believes.

That all the foregoing statements in this affidavit after the word "facts" in the fourth line on page 3, to and including "1880" in the 16th line on page 4, and after "United States" in the 7th line from the bottom of page 4 to the end of the table of figures headed "General balance, December 31st, 1879" on page 5, and from and including the words "that the said balance" in the 25th line on page 5 to the end of the 11th line from the bottom of page 6 are

made by deponent upon information and belief; that similar allegations, but more in detail are made by deponent upon information and belief in the complaint in this action.

That the said defendant has not made a designation of any address either within or without the State, upon any of the preceding papers in this action, for the purpose of service of papers upon it or otherwise, except "15 Washington street, Watertown, N. Y." appearing under the signature of its attorneys, Purcell, Walker &
Burns, to the notice of special appearance, and notice of
26 motion, copies of which are hereto attached marked Exhibits "A" and "B" and made a part of this affidavit.

That no previous application has been made herein for an order to examine the deponent in this action and deponent therefore asks that an order may be made, pursuant to provisions of article 1, title 3, chapter 9 of the Code of Civil Procedure for his examination herein.

That the said motion made by the defendant and set forth in Exhibit "B" hereto attached, has been duly heard and denied by the court.

HIRAM REMINGTON.

Subscribed and sworn to before me this 16 day of October, 1903.

LUCILL R. BAIN,
*Notary Public, Jefferson County, New York.*

27 EXHIBIT "A."

Supreme Court, Jefferson County.

HIRAM REMINGTON
*vs.*
CENTRAL PACIFIC RAILWAY COMPANY.

Please take notice that we appear in this action for the defendant for the purpose only of making a motion herein to set aside the service of the summons in this action on the defendant.

Dated May 11th, 1903.

Yours, etc., PURCELL, WALKER & BURNS,
*Attorneys for the Defendant for the Purposes Stated.*

15 Washington street, Watertown, N. Y.

To Messrs. Brown, Carlisle & Hugo, Watertown, N. Y.

28 EXHIBIT "B."

Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
THE CENTRAL PACIFIC RAILWAY COMPANY.

Take notice that upon the summons herein and the affidavit of J. C. Stubbs, verified May 2nd, 1903, and a copy of which is hereto annexed and herewith served, a motion will be made at a special term of the supreme court, appointed to be held at the court house in the city of Utica, N. Y. on May 16th, 1903, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order setting aside the service of the summons herein, on the ground that such service was irregular, defective, null and void and of no effect; or for such other or further order as may be proper, with costs of motion.

Dated May 11, 1903.

Yours, etc., PURCELL, WALKER & BURNS,
*Attorneys for Defendant for Purposes of This Motion Only.*

15 Washington street, Watertown, N. Y.

To Messrs. Brown, Carlisle & Hugo, plaintiff's attorneys.

29 STATE OF NEW YORK:

Supreme Court, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF WISCONSIN, *Milwaukee County,* } ss:

Frederick H. Remington, being first duly sworn, deposes and says that he is a son of the plaintiff in the above entitled action. That he is an attorney and counsellor at law residing and practising law at the city of Milwaukee, Wisconsin. That he is one of the counsel for the plaintiff in the above entitled action. That in the month of January, 1903, affiant visited the First national bank in the city of New York, State of New York, for the purpose of seeing what entries were upon the books of said bank relating to the purchase and sale of stock in the Central Pacific Railroad Company by the above

named plaintiff, Hiram Remington, and for the purpose of seeing what entries were upon the books of said bank relating to the collection of dividends upon said stock for said plaintiff. That at said time affiant had an interview with a vice-president of said bank and was then and there informed by said vice-president that the account books of said bank covering the years 1881, 1882, 1883, 1884 and 1885 had been destroyed.

That in the month of January, 1903, affiant received a letter from an attorney at law residing at San Francisco, California, with whom he corresponded in reference to the matters involved in this action, which letter was dated January 20, 1903. That said letter, among other things, stated that the office of the Central Pacific Railroad Company is at number 4 Montgomery street, Southern Pacific building in said city of San Francisco.

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 6th day of October, 1903.

[SEAL.] FRED A. FOSTER,
*Notary Public, Milwaukee County, Wisconsin.*

STATE OF WISCONSIN, COUNTY OF MILWAUKEE, } ss:
*Office of the Clerk of the Circuit Court,*

I, A. A. Wieber, clerk of the circuit court being a court of record, and having a seal, do hereby certify that Fred A. Foster, Esquire, whose name appears subscribed to the annexed instrument, was at the date thereof a notary public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said State to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such, full faith and credit is and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to be his, is genuine; that the seal hereto attached is a correct impression of his official seal, and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said county and State, on the 6th day of October, one thousand nine hundred and three.

[Seal of Circuit Court, Milwaukee County, Wisconsin.]

A. A. WIEBER,
*Clerk of Circuit Court.*

31 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*City and County of New York,* } ss:

Ellis L. Aldrich being duly sworn deposes and says that he resides at the city of New York, New York, and is over the age of twenty-one years. That on the 10th day of April, 1903, he personally served the annexed summons in the above entiled action upon the defendant, Central Pacific Railroad Company, which as deponent is informed and verily believes is a foreign corporation, by personally delivering to and leaving with J. C. Stubbs, who as deponent is informed and verily believes was then a director of the said corporation, a true copy of the said summons at 120 Broadway in the borough of Manhattan, city of New York, N. Y.; that at the time deponent served the said summons as aforesaid he knew the said Central Pacific Railroad Company to be the same person mentioned and described in the said summons as defendant therein.

The deponent further says that before making the service on the said J. C. Stubbs as director of the said defendant, he was informed by Brown, Carlisle and Hugo, plaintiff's attorneys, that from certain investigations made on behalf of the plaintiff by F. H. Remington, it appeared that all of the officers of the said defendant, Central Pacific Railroad Company, resided in San Francisco; that
32 J. L. Wilcutt, a secretary of the Central Pacific Railroad Company and N. T. Smith, treasurer of the Central Pacific Railroad Company, might be in New York city during the early part of April to attend a conference of persons representing the Southern Pacific Railroad Company with which they were connected. That on or about the 6th day of April, 1903, deponent sent Andrew Hunter, whose affidavit is hereto attached, to enquire at the office of the Southern Pacific Railroad Company which is also the office of the Central Pacific Railroad Company, for J. L. Wilcutt and N. T. Smith, but that the said Andrew Hunter was there advised that the said Wilcutt and Smith were not expected in New York and that there was nothing to bring them here; that they very seldom came to New York from San Francisco.

That deponent on the 10th day of April, learned that J. C. Stubbs who as he was informed and verily believes was at that time a director in the Central Pacific Railroad Company, was in New York for a day and deponent thereupon served him as aforesaid.

That subsequently on the 13th day of May, 1903, deponent called

at the office of the Central Pacific Railroad Company at 120 Broadway, borough of Manhattan, city of New York, and was there told by a person in the said office that all of the officers of the Central Pacific Railroad Company, on the 10th day of April 1903, resided and had their places of business in the western part of the United States, without the State of New York, and that there were on the said 10th day of April, 1903, no persons within the State of New York, performing corresponding functions to the president, treasurer or secretary of the said Central Pacific Railroad Company under another name. That deponent did not search for a person designated under the second subdivision of section 432 of the Code of Civil Procedure for the purpose of serving said summons upon said person for the reason that no such designation had been made
33 by the said defendant as deponent is informed and verily believes.

ELLIS L. ALDRICH.

Subscribed and sworn to before me this 6th day of June, 1903.

FRANCIS A. HUNEKAN,
*Commissioner of Deeds for New York City.*

STATE OF NEW YORK, } ss:
*Jefferson County Clerk's Office,* }

I, E. A. Chapman, county clerk of the county of Jefferson and clerk of the supreme and county courts in and for said county, the same being courts of record, do hereby certify that I have compared the foregoing copy of affidavit of Ellis L. Aldrich verified June 6th, 1903, hereto annexed with the original affidavit in this office and that the same is a true and correct transcript thereof and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said courts at city of Watertown, N. Y. this 17th day of October, 1903.

[L. S.] (Signed) E. A. CHAPMAN, *Clerk.*

34 In Supreme Court, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK, } ss:
*County of New York,* }

Ellis L. Aldrich, being duly sworn, says that he resides at the city of New York, N. Y., and is over the age of twenty-one years.

That on the 10th day of April, 1903, he personally served a copy of the annexed summons upon J. C. Stubbs at 120 Broadway in the borough of Manhattan, city of New York, N. Y., by personally delivering to and leaving with the said J. C. Stubbs a true copy of the said summons.

That as deponent is informed and verily believes, the said defendant, Central Pacific Railroad Company, is a foreign corporation, and that the said J. C. Stubbs is and was at the time of said service a director of The Central Pacific Railroad Company the defendant named in the above entitled action.

That deponent further says that he used due diligence to obtain service of the said summons upon an officer of said defendant within the State of New York, but that no president, treasurer or secretary or officers performing corresponding functions under another name could be found by deponent within the State of New York.

That deponent has called at the office of the Southern Pacific Railroad Company in the borough of Manhattan, city of New York, N. Y., and was there informed that that was also the office of the defendant, Central Pacific Railroad Company. That deponent was further informed at the said office that none of the officers of the defendant, Central Pacific Railroad Company, resided or had his place of business in the State of New York, but that all of the officers of the said Central Pacific Railroad Company resided and had their places of business in the western part of the United States without the State of New York on the 10th day of April, when the said service was made.

ELLIS L. ALDRICH.

Sworn to before me this 15th day of May, 1903.

FREDERICK C. SIMONS,
*Notary Public*, # 324, *New York County*.

STATE OF NEW YORK,
*Jefferson County Clerk's Office*, } ss:

I, E. A. Chapman, county clerk of the county of Jefferson and clerk of the supreme and county courts in and for said county, the same being courts of record, do hereby certify that I have compared the foregoing copy of affidavit of Ellis L. Aldrich verified May 15, 1903, hereto annexed with the original affidavit in this office, and that the same is a true and correct transcript thereof and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said courts at city of Watertown, N. Y. this 17th day of October, 1903.

[L. S.] (Signed) E. A. CHAPMAN, *Clerk*.

36 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of New York, City of New York,* } ss:

Andrew Hunter, being duly sworn, says, that on or about the 6th day of April, 1903, he was employed by Aldrich & Vandewalker, to make service of the summons in the above entitled action upon the defendant herein; that he proceeded on that day with said summons in his possession to the office of the Southern Pacific Railroad Company at 120 Broadway, Manhattan, New York city, which said office is also the office of the Central Pacific Railroad Company in New York, and made inquiries in said office for J. C. Willcutt the secretary and N. T. Smith the treasurer of said Central Pacific Railroad Company but that deponent was there informed that neither said Willcutt nor said Smith were in New York, but that they resided and had their places of business in the city of San Francisco, in the State of California; that neither of them were expected to come to New York and that they very seldom came East from San Francisco; that deponent reported the result of his effort to serve said paper to said Aldrich & Vandewalker.

ANDREW HUNTER.

Sworn to before me this 8th day of June, 1903.

WILLARD S. ALLEN,
*Notary Public, New York County.*

37 STATE OF NEW YORK,
*Jefferson County Clerk's Office,* } ss:

I, E. A. Chapman, county clerk of the county of Jefferson and clerk of the supreme and county courts in and for said county, the same being court of record, do hereby certify that I have compared the foregoing copy of affidavit of Andrew Hunter, verified June 8th, 1903, hereto annexed with the original affidavit in this office, and that the same is a true and correct transcript thereof and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed the seal of said courts at city of Watertown, N. Y. this 17th day of October, 1903.

[L. S.] (Signed) E. A. CHAPMAN, *Clerk.*

[Endorsed:] Supreme court. Hiram Remington *vs.* Central Pacific Railroad Company. (Copies) Affidavit & order to examine plaintiff. Brown, Carlisle & Hugo, attorneys for plaintiff, 8 Stone street, Watertown, N. Y.

SIR: Take notice that the within is a copy of an order duly granted on the 19 day of October, 1903.

Yours, &c., BROWN, CARLISLE & HUGO,
*Attorneys for Pl'ff, 8 Stone Street, Watertown, N. Y.*

To —— ——, attorney for —.

38 At a special term of the supreme court, held at the court house in the city of Syracuse, N. Y., on the 24th day of October, 1903.

Present: Hon. W. S. Andrews, justice presiding.

Supreme Court, Jefferson County.

HIRAM REMINGTON
*against*
CENTRAL PACIFIC RAILROAD COMPANY.

An order having been made in this action and entered in the office of the clerk of Jefferson county October 2nd, 1903, denying a motion duly made by the defendant to set aside the service of the summons herein, and the defendant having appealed from said order to the appellate division of this court:

Now, on reading and filing the affidavit of Thomas Burns, one of the attorneys for the defendant above named, appearing specially herein, which affidavit was verified October 16th, 1903, and the notice of motion for an order staying all proceedings on the part of the plaintiff and the affidavit of Frederick H. Remington, verified October 19, 1903; and after hearing Purcell, Walker & Burns, in support of said motion, and Brown, Carlisle & Hugo, attorneys for the plaintiff, opposed, it is

Ordered, that the defendant be relieved from any default in appearing herein and that all proceedings on the part of the plaintiff be stayed pending said appeal and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein granted by Hon. E. C. Emerson, county judge of Jefferson county, and entered in said clerk's office October 19th, 1903.

Let the papers upon which this motion was made be filed and this order entered in Jefferson county.

Enter:

W. S. A., *J. S. C.*

Approved:
P., W. & B.
B., C. & H.

39 Supreme Court, Jefferson County.

HIRAM REMINGTON, Respondent,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Appellant.

SIRS: You will please take notice that upon the affidavit of Thomas Burns, hereto annexed, verified October 16th, 1903, and upon all the papers heretofore served or filed, and proceedings had in the above-entitled action, we will move this court, at a special term thereof, to be held at the court house *at the court house* in the city of Syracuse, N. Y., on the 24th day of October, 1903, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order staying all proceedings on the part of the plaintiff, respondent, under the order entered herein in the clerk's office of Jefferson county on the 2nd day of October, 1903, until the decision of the appellate division of this court, fourth department, upon the appeal taken from the said order by the defendant, appellant, or for such other relief as may be just.

Dated, Watertown, N. Y., October 16th, 1903.

Yours, etc.,

PURCELL, WALKER & BURNS,
*Attorneys for the Appellant for the Purposes of This Motion and said Appeal.*

15 Washington street, Watertown, N. Y.

To Brown, Carlisle & Hugo, Esqrs., attorneys for the respondent.

40 Supreme Court, Jefferson County.

HIRAM REMINGTON, Respondent,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Appellant.

STATE OF NEW YORK,
*County of Jefferson, City of Watertown,* } ss:

Thomas Burns, being duly sworn, says he is one of the attorneys for the defendant above named, who appears specially in this action by Purcell, Walker & Burns, attorneys and counsellors of this court, residing at Watertown, N. Y.; that on the 2nd day of October, 1903, an order was entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no com-

plaint has been served or filed herein, as deponent is informed and believes.

That on October 15th, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the appellate division of this court, fourth department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this court for judgment herein; that no previous application for a like order has been made.

THOS. BURNS.

Sworn to before me this 16th day of October, 1903.

M. A. BURNS,
*Com'r of Deeds, City of Watertown.*

41 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF WISCONSIN, *Milwaukee County*, } ss:

Frederick H. Remington, being first duly sworn, deposes and says that he is an attorney and counsellor at law and is one of the plaintiff's counsel in the above entitled action; that he is a son of said plaintiff; that if a stay of proceedings is ordered by the court sufficiently broad to prevent the taking of the plaintiff's deposition in said action it may result very disastrously to the rights of the plaintiff; that the plaintiff's evidence is absolutely necessary to support a verdict in behalf of the plaintiff in said action; that if the plaintiff's deposition is not taken and the plaintiff should become incapacitated as a witness before the trial of said action it would be impossible for him to recover in said action, and if the said action should not be tried within the lifetime of the plaintiff, and said action should be revived by his personal representatives, it would be impossible for them to recover in said action without the plaintiff's deposition; that affiant is fully informed concerning the sources from which the plaintiff, or his personal representatives, can obtain evidence, that a large part of the stock of the Central Pacific Railroad Company purchased by the plaintiff and subsequently sold by him, from which purchases of said stock this action arises, was purchased by the plaintiff and sold by him through the agency of the

First National Bank of the City of New York, and a large part of the dividends collected by the plaintiff from the de-
42 fendant on said stock during the time he held the same was collected for him through the agency of said First national bank; that in the month of January, 1903, affiant visited the said First national bank in said city of New York for the purpose of ascertaining what entries appeared upon the books of said bank relating to said stock, and that affiant was then and there informed by a vice-president of the said First national bank that all the books of account of said bank covering the period of said transactions has been destroyed; that for the reason that the certificates representing said stock so purchased by the plaintiff were not transferred to the plaintiff upon the books of the defendant, and on account of the destruction of said account books of said First national bank, the plaintiff is the only person who can testify concerning the said purchases and concerning said sales of said stock, and concerning the said dividends so collected; that the plaintiff is 87 years of age and his eye-sight is very poor; that in order that the plaintiff may testify concerning the purchases and sales of stock of the Central Pacific Railroad Company concerning which this action is brought, and concerning the dividends collected on the same, it will be necessary for the plaintiff to refresh his memory by reference to entries made in his books of account by him at the time of said transactions, and that if the plaintiff's eyesight should become any poorer it would be impossible for him to see the said entries in his said books; that the testimony of the plaintiff is material and necessary upon several other points in the case besides that above mentioned, and the plaintiff, or his personal representatives, in case of his death before the trial of this action, could not safely proceed to the trial of this action without his testimony upon such points; that among said points upon which his testimony is material and necessary is that concerning the reading by him of a certain article relating to the Central Pacific Railroad Company in Poor's Manual previous to the purchase of said stock, and the fact that he relied upon the information contained
43 in said article in purchasing the said stock, and that he believed the said article to be in all respects true at the time he made the said purchase; that the plaintiff had an attack of pneumonia in or about the month of March, 1903, lasting about four weeks, and in the summer of 1903 had an attack of erysipelas, and on this account, and also on account of his advanced age, it will be very hazardous to postpone the taking of his deposition; that papers have already been prepared for the purpose of taking the plaintiff's deposition on the 2d of November, 1903, and it is the intention of the plaintiff's attorneys and the plaintiff's counsel to take the said deposition at said time, after giving the defendant notice thereof as provided by the Code of Civil Procedure and the order for the taking of said deposition.

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 19th day of October, 1903.

FRED A. FOSTER,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

STATE OF WISCONSIN, COUNTY OF MILWAUKEE, } ss:
*Office of the Clerk of the Circuit Court,* }

I, A. A. Wieber, clerk of the circuit court of the county of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Fred A. Foster, Esquire, whose name appears subscribed to the annexed instrument, was at the date thereof a notary public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said State to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage, may be performed by notaries public, and that to his acts and attestations as such full faith and credit is and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to *he* his, is genuine; that the seal hereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said county and State, on the 19th day of October, one thousand nine hundred and three.

A. A. WIEBER,
[SEAL.] *Clerk of Circuit Court.*

44 Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

GENTLEMEN: Please take notice, that the defendant herein appeals to the appellate division of the supreme court, fourth department, from the order of the supreme court herein, granted at a special term thereof on the 11th day of July, 1903, and entered in the clerk's office of the county of Jefferson on the 2d day of October, 1903, and from the whole of said order.

Dated, at Watertown, N. Y., October 15th, 1903.

Yours, etc., PURCELL, WALKER & BURNS,
*Attorneys for the Appellant, for the Purposes of This Appeal.*

15 Washington street, Watertown, N. Y.

To the clerk of the county of Jefferson, and to Brown, Carlisle & Hugo, Esqs., attorneys for the respondent.

45 At a special term of the supreme court held at the court house in the city of Syracuse, N. Y. on the 11th day of July, 1903.

Present: Hon. William S. Andrews, justice presiding.

Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

On reading and filing the notice of motion herein made by the defendant to set aside the service of the summons herein, and on reading and filing the affidavit of J. C. Stubbs, verified May 2, 1903, and the affidavit of George Watkins, verified June 24, 1903; the affidavit of Maxwell Evarts, verified June 26, 1903; the affidavit of Isaac E. Gates, verified June 24, 1903, in favor of said motion, and on reading and filing the three affidavits of Frederick H. Remington, verified respectively May 16, May 28 and July 2, 1903, and two affidavits of the plaintiff Hiram Remington, verified May 19, 1903, and July 6, 1903, respectively, and the affidavit of Robert J. Cutting, verified July 7, 1903, and two affidavits of Ellis L. Aldrich, verified May 15th, 1903, and June 6, 1903, respectively; and affidavit of Andrew Hunter, verified June 8, 1903; affidavit of Augustus T. Gillender, verified July 26, 1903, affidavit of George Watkins, verified July 2, 1903; affidavit of Charles H. Patterson, verified July 2, 1903, and the certificate of the secretary of state, dated June 1, 1903, in opposition to said motion and on reading
46 and filing the stipulation signed by the attorneys for the parties hereto, dated August 24, 1903, submitting this motion to the above term of court, and after hearing Purcell, Walker & Burns, counsel for defendant in favor of said motion, and Brown, Carlisle & Hugo, counsel for plaintiff in opposition thereto,

It is hereby ordered that said motion be and the same is hereby denied with ten dollars' costs to the plaintiff.

Enter in Jefferson county

Dated Sept. 28th, 1903.

Enter:

W. S. A., *J. S. C.*

47 In Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

Whereas a notice of motion was heretofore made by the defendant in the above entitled action for an order to set aside the service of the summons herein, which motion was noticed for a special term

of the supreme court appointed to be held at the court house in the city of Utica, N. Y. on the 16th day of May, 1903, and

Whereas, said motion was by stipulation transferred to a special term appointed to be held at the city of Watertown, N. Y. on the 25th day of May, 1903, and

Whereas, Mr. Justice Rogers who held said term declined to hear said motion for the reason that he had, previous to his election, acted as counsel for the plaintiff, and

Whereas, the hearing of said motion was then fixed by agreement for a special term appointed to be held in the city of Watertown, N. Y., on the 9th day of June, 1903, and

Whereas, at that time the papers of the respective counsel having been presented, the court allowed the defendant until July 1, 1903, to serve additional affidavits, and the hearing of the motion was ordered to be set down for a special term appointed to be held in the city of Syracuse, N. Y. on the 11th day of July, 1903, and

Whereas, said motion was not heard at said term on account of the illness of Mr. Purcell, one of the attorneys for the defendant, and it is desired that the said motion and all papers in connection therewith should be submitted to Hon. William S. Andrews, justice of the supreme court, for his decision,

It is now hereby stipulated that said motion and all papers in connection therewith be submitted to said justice as of the special term heretofore appointed to be held at the court house in the city of Syracuse, N. Y. on the 11th day of July, 1903, with the same force and effect as if said motion papers had been submitted at said special term.

Dated August 24, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*
PURCELL, WALKER & BURNS,
*Defendant's Attorneys, Appearing Specially.*

48 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of New York,* } ss:

Robert L. Cutting, being first duly sworn on oath deposes and says that he is an attorney and counselor-at-law, duly admitted to practice as such in the courts of the State of New York; that he has his office at No. 41 Park row, in the city of New York; that he

is the attorney for the plaintiff in an action now pending in the supreme court of the State of New York, county of New York, wherein one Walter Morshead, on behalf of the stockholders of the Central Pacific Railroad Company is plaintiff, and Charles H. Tweed, Isaac E. Gates and Arabella Huntington, as executors of Collis P. Huntington, deceased, and The Central Pacific Railroad Company are defendants; that the summons in said action was served upon said Isaac E. Gates and on said Central Pacific Railroad Company on the 29th day of August, 1902; as appears by the sheriff's return attached to said summons; that the complaint in said action was verified by the plaintiff on the 8th day of October, 1902, and the answer of said Isaac E. Gates as such executor, a copy of which has been served upon affiant, was verified on the 5th day of December, 1902; that the defendant Central Pacific
49 Railroad Company has not served any answer in said action; that the said action has not yet been tried and is still pending for trial upon the issues raised by the answer of said Isaac E. Gates; that a copy of the complaint in said action, with the exception of the verification, is hereto attached marked Exhibit "A" and made a part of this affidavit; that before drawing the said complaint affiant made a careful investigation of evidence relating to the facts set forth in said complaint; that after making the said investigation affiant verily believes that the said complaint Exhibit "A" truthfully states the facts relating to the controversy in said action, and verily believes that the said complaint is in all respects true; that Collis P. Huntington mentioned in said complaint was at the time of his death and for many years prior thereto, a resident of the city of New York, State of New York, and that Charles H. Tweed, Isaac E. Gates and Arabella Huntington, the executors of his last will and testament, and the defendants as such executors in said action, are residents of the said city of New York.

Deponent further says that the action brought by Walter Morshead as above set forth has not been abandoned but that deponent intends in good faith to try said action, and verily believes that the plaintiff has a good and substantial cause of action upon the merits against the defendant in said action.

ROBERT L. CUTTING.

Subscribed and sworn to before me this 7th day of July, 1903.

[NOTARIAL SEAL.] ALPHONSE KLOH,
*Notary Public, New York County, New York.*

50 EXHIBIT A.

Supreme Court of the State of New York, City and County of New York.

WALTER MORSHEAD, on Behalf of the Stockholders of the Central Pacific Railroad Company, Plaintiff,
*against*
CHARLES H. TWEED, ISAAC E. GATES, ARABELLA Huntington, as Executors of Collis P. Huntington, and The Central Pacific Railroad Company, Defendants. } *Complaint.*

The plaintiff herein by Robert L. Cutting, his attorney, complains of the defendants, and shows:

I. That the plaintiff is the owner and holder of one hundred shares of the capital stock of the Central Pacific Railroad Company, which stands in his name on the stock books of said company and has so stood for about eight years last past, and that he is the owner of other shares of said Central Pacific railroad stock which is held in trust for him, and that plaintiff is a resident of the State of New York. That he brings this action on behalf of holders of other shares of stock in the Central Pacific Railroad Company similarly situated, and at the special request of some thereof. That Charles H. Tweed, Isaac E. Gates and Arabella Huntington are the duly qualified executors of the estate of Collis P. Huntington, as hereinafter set forth. That the Central Pacific Railroad Company is a foreign railroad corporation created by and organized under the laws of the State of California.

II. That the plaintiff has duly made demand in writing
51 on the officers and directors of the said Central Pacific Railroad Company, that they institute legal proceedings for the cause of action stated in this complaint. But that the said Central Pacific Railroad Company has not instituted, so far as this plaintiff knows, any such legal proceedings against these individual defendants. That the said Huntington during his lifetime was an officer and director of the said Central Pacific Railroad Company and, as plaintiff is informed and believes, the said Tweed and Gates were, and still are, officers of the said Central Pacific Railroad Company. And, as plaintiff is informed and believes, said Huntington and associates in the transactions hereinafter set forth, controlled the board of directors of the said Central Pacific Railroad Company during said Huntington's lifetime, and that since the death of the said Huntington, the said Tweed and associates have, and do now, influenced by him, control, and dominate the said board of directors of the said Central Pacific Railroad Company to such an extent, that, as this plaintiff is informed and verily believes, no attempt has been

or will be made to establish the liability of the said Huntington, or for the recovery from the estate of the said Huntington of the sums of money for which the said Huntington was liable by his acts as set forth in this complaint. That no corporate meeting of the said Central Pacific Railroad Company has been held, nor have any new officers been elected, since the year 1899, though the said corporation has never been dissolved.

III. That the Central Pacific Railroad Company is a railroad corporation organized under the laws of the State of California and that said Central Pacific Railroad Company received large loans and subsidies from the United States of America in bonds amounting in the aggregate to some thirty millions of dollars in value, more or
52 less, for the construction and equipment of its said railroad.

IV. That the said Collis P. Huntington, together with Leland Stanford, Charles Crocker and Mark Hopkins, were directors and officers of the said Central Pacific Railroad Company, and to the time of their decease they were, as plaintiff is informed and believes, in control of the corporate affairs of the said Central Pacific Railroad Company. And the said Collis P. Huntington was, in addition, the financial agent of the said Central Pacific Railroad Company in New York city and in Washington, D. C. and until the year 1899 held a general power of attorney to transact all the corporate business of the said railroad company in said places as its general agent.

V. That, as the plaintiff is informed and believes, said Huntington and his associates, the said Stanford, Crocker, and Hopkins, organized or caused to be organized certain companies known as the Contract and Finance Company, the Western Development Company, the Pacific Improvement Company, the Pacific Express Company, the Rocky Mountain Coal Company, and other companies, which companies were personally owned or controlled, through ownership of the stock thereof, by the said Huntington and his said associates, either personally or by and through their agents, dummies and accomplices. And the said Huntington and his said associates, using the names, corporate forms, and instrumentalities of these said companies together with themselves, acting in the name of the Central Pacific Railroad Company and on its behalf, for the construction, equipment, and repairing of said railroad, and for the purchase and leasing of branch and auxiliary lines of railroad, and for the purchase of coal and materials for the said railroad company, and for doing express business of the said railroad company, and for other purposes. And the said Huntington
53 and his associates, while in control of the said Central Pacific Railroad Company, as its officers, directors, and agents, were also at all times interested in the results of the said contracts made between the Central Pacific Railroad Company and the other said companies through their ownership of the stocks of the said companies.

VI. And that in pursuance of these fraudulent arrangements, as

the plaintiff is informed and believes, the said Huntington and his associates from time to time delivered to themselves, through the instrumentalities of the said companies named in paragraph V herein, the whole or a greater part of the thirty million dollars' worth of the aforesaid United States bonds, and likewise the whole or a greater part of bonds and capital stock of the said Central Pacific Railroad Company to the total value, as the plaintiff is informed and believes, of upwards of one hundred and sixty-three millions of dollars, which bonds and stocks were obtained in pretended payment to the companies aforesaid for the purposes set out in paragraph V of this complaint. And the plaintiff herein is informed and believes that the construction of the said Central Pacific Railroad Company's railroad and of all its constituents, leased and auxiliary lines, did not actually cost more than sixty millions of dollars, so that the pretended payment- to the aforesaid companies on alleged construction and other contracts and for other purposes were fraudulent, grossly excessive, collusive, and in violation of the duties of the said Huntington and his associates as officers, directors and agents of the said Central Pacific Railroad Company; and the plaintiff alleges on information and belief that the said United States bonds and the bonds and stock of the said Central Pacific Railroad Company were actually converted to their own use or uses by the said Huntington and his said associates through the col-
54 orable and fraudulent devices herein set forth.

VII. And, as this plaintiff is informed and believes, the said Huntington, from the beginning of the frauds and devices herein alleged and throughout their pendency for the most part directed and managed these schemes and conspiracies to plunder the said Central Pacific Railroad Company, which schemes and conspiracies were consummated and resulted in the conversions set forth more particularly in paragraphs V and VI of this complaint. The said Hopkins died in the year 1878. The said Crocker died in the year 1888. And the said Stanford died in the year 1893. But, as this plaintiff is informed and believes, the conversions of the property of the said Central Pacific Railroad Company and the other illegal and fraudulent acts herein alleged, or some of them, were continued by the said Huntington down to the time of his death, in August, 1900.

VIII. That the said Collis P. Huntington departed this life on August 13th, 1900. That his will was approved and letters testamentary were duly issued to his executors, the defendants herein, to-wit: Charles H. Tweed, Isaac E. Gates, Arabella Huntington, on October 15th, 1900, by the surrogate of New York county.

Wherefore, the plaintiff prays that the said executors, the defendants herein, be decreed to account for the profits made by their said decedent, Collis P. Huntington, as set out in this complaint, and that the said executors pay the said profits with legal interest, to the Central Pacific Railroad Company for the benefit of its stockholders.

And the plaintiff further prays for an order that the said executors the defendants herein, be enjoined by this court from paying
55 out, distributing or in any way disposing of or parting with the assets of the said estate of their said decedent, Collis P., Huntington, until the amounts owing to the Central Pacific Railroad Company, be ascertained and adjudged, or until further order of this court.

That the plaintiff have such other, further and different relief as to the court may seem just.

ROBERT L. CUTTING,
*Plaintiff's Attorney.*

Post office and office address, 41 Park row, New York city.

56 Supreme Court of New York, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK, }
*County of New York,* } ss.:

Maxwell Evarts, being duly sworn, deposes and says: I am the counsel for the defendant in the above entitled action and reside at No. 238 East 13th street, in the city of New York. I am also the attorney for the defendant Isaac E. Gates in the action brought in the supreme court of the State of New York, in and for the county of New York, wherein one Walter Morshead is plaintiff and the executors of Collis P. Huntington, deceased, and The Central Pacific Railroad Company are named as defendants, referred to in the affidavit of Frederick H. Remington, counsel for the plaintiff herein, verified the 28th day of May, 1903. I deny the allegations in said affidavit of Frederick H. Remington that the summons in said action was served upon the Central Pacific Railroad Company. On the contrary, the summons in said action was never served upon the Central Pacific Railroad Company, or upon any of the parties named as defendants in the action, except the defendant Isaac E. Gates. Said action has never been in any way pressed by the plaintiff and has not even been put upon the calendar of the court and has virtually been abandoned.

57 I deny that on the 10th day of April, 1903, or at any other time, the Central Pacific Railroad Company had a large claim or any claim against the estate of Collis P. Huntington, deceased, and the excutors of his last will and testament, as is alleged in said affidavit of Frederick H. Remington. I deny that the Central Pacific Railroad Company had on the 10th day of April, 1903, or has had since the 29th day of July, 1899, any property whatever of any

kind in the State of New York; and do further aver that since the date last mentioned the said company has not done or transacted any business within this State.

This action so far as it is possible to judge from the affidavits submitted by the plaintiff, seems to be of the same general character as the many litigations with which I am familiar brought by Walter Morshead, who is referred to in the affidavit of Frederick H. Remington, verified the 28th day of May, 1903, as being the plaintiff in a suit against the executors of Collis P. Huntington, deceased. The said Morshead is the holder of 100 shares of the stock of the Central Pacific Railroad Company, and since the readjustment of the affairs of said company, with the United States in the year 1899, he has been the plaintiff in at least four litigations in regard to the affairs of the Central Pacific Railroad Company, none of which have ever been actually pressed by the plaintiff in any way, and all of which were brought, as I am informed and believe, to harass and annoy the said company.

On the 2nd day of December, 1902, the said Morshead made an application to the surrogate's court of the county of New York to require the executors of Collis P. Huntington, deceased, to file an inventory of the estate. This application was based upon the same facts set forth in the complaint referred to in the affidavit of
58 said Frederick H. Remington, verified May 28th, 1903, a copy of which complaint is attached to the affidavit of Isaac E. Gates, submitted herewith. This application was denied by the surrogate and at the end of a written opinion the character of the Morshead claim was referred to by the surrogate as follows:

"The purpose of filing an inventory is to give information to the parties having interest in the assets. Even if a discretionary power could be spelled out from the statute, to require the exhibition of the affairs of the estate on the request of a person holding an unproved and disallowed demand, such discretion should be exercised, only where the surrogate is satisfied *that the claim is probably meritorious*, and that the opposition to it is vexatious and probably unreasonable. *The facts disclosed by the affidavits submitted on this application do not lead me to any such conclusion, and, if I have such discretionary power, I refuse to exercise it. The application is denied.*

MAXWELL EVARTS.

Subscribed and sworn to before me this 26 day of June, 1903.

[NOTARIAL SEAL.] CHARLES FRANKLIN,
*Notary Public*, 127, *New York County.*

59 Supreme Court of New York, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of Kings,* } ss:

George Watkins, being duly sworn, deposes and says: I reside at 656 Nostrand avenue, in the borough of Brooklyn, city of New York. From the month of May, 1882, to and including the month of July, 1899, I was the transfer agent in the city of New York of the Central Pacific Railroad Company and had charge of the transfer books of said company, and at no time during said period was any stock of the Central Pacific Railroad Company transferred upon said books to the plaintiff herein Hiram Remington. I further state that the transfer books of the Central Pacific Railroad Company show that at no time was any stock of the Central Pacific Railroad Company ever transferred to the said Hiram Remington, and that at no time did any stock stand in his name upon the books of said company.

GEO. WATKINS.

Subscribed and sworn to before me this 24th day of June, 1903.

WM. G. ANDERSON,
*Notary Public, # 76, Kings Co., N. Y.*

60 Supreme Court of New York, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of New York,* } ss:

Isaac E. Gates, being duly sworn, deposes and says: I am one of the executors of the last will and testament of Collis P. Huntington, deceased. From the year 1875 to the time of Mr. Huntington's death I was intimately acquainted with all his business matters and I am able to and do state on my own knowledge that said Huntington, at the time of his death, was not indebted to the Central Pacific Railroad Company in any amount whatever, and that the said Central Pacific Railroad Company never had any claim of any kind against the estate of said Huntington.

I was from the year 1875 to the year 1901 closely connected with

the affairs of the Central Pacific Railroad Company, holding the following offices for the times stated, viz:

From 1889 to 1894 (with the possible exception of a single year) the office of acting vice president of said company;

From 1895 to 1898, the office of director and third vice president of said company.

61 Referring to the following allegations in the affidavit of Frederick H. Remington, counsel for the plaintiff in the above entitled action, verified the 16th day of May, 1903, and submitted by the plaintiff in opposition to the motion to set aside the service of the summons in the above case, viz:—

"That the cause of action for which the above entitled action is brought arose in the State of New York during the period that the said defendant maintained an office in said city of New York as aforesaid; that this action is brought for the purpose of recovering damages from the said Central Pacific Railroad Company for issuing illegal and void certificates of the capital stock of said Central Pacific Railroad Company, and for making and causing to be published false and fraudulent representations concerning the capital stock represented by said certificates, and concerning the affairs and conditions of said Central Pacific Railroad Company, and concerning the consideration paid to said company for said stock, for the purpose of giving said capital stock represented by said certificates a fictitious value upon the market, and for the purpose of inducing the public to purchase said stock represented by said certificates; and upon the ground that said illegal, fraudulent and void certificates of stock were issued by the defendant in the State of New York, and that said false and fraudulent representations were made and published by the defendant in the State of New York; and upon the ground that the plaintiff, Hiram Remington, is and at all times herein mentioned was a resident of the State of New York, and that the said plaintiff, believing the said certificates of stock to be legal and properly issued, and believing that full consideration had been

62 paid to said defendant, Central Pacific Railroad Company therefor, and relying upon the said certificates of stock being legal, valid and properly issued, and relying upon the said representations made as aforesaid being true, and induced by said belief and by said representations, purchased a large amount of said stock represented by said illegal and fraudulent certificates, which purchases were made by him in the city of New York, State of New York, and paid large sums of money for the same, which payments were made by him in the city of New York, State of New York, and such illegal, fraudulent and void certificates were thereupon transferred to him in the city of New York, State of New York. And upon the ground that the said certificates were in fact worthless and well known to the defendant to be worthless when issued as aforesaid and when said representations were made and published as aforesaid; and that by reason of the said illegal, fraudulent and void issue of said certificates by the defendant, and by reason of

said false and fraudulent representations, those of the same so purchased by the plaintiff greatly depreciated while they were held by him, and the plaintiff lost a large amount of money by reason of having purchased the said fraudulent and void certificates of stock as aforesaid, and was damaged in the amount of said loss by reason of the facts herein set forth and which will be more fully set forth in the complaint in this action."

I deny said allegations, and each of them, except the allegation that Hiram Remington is and at all times mentioned in said affidavit was a resident of the State of New York, as to which I have no knowledge or information.

63 Referring to the following allegations in the affidavit of Frederick H. Remington, counsel for the plaintiff in the above entitled action, verified the 28th day of May, 1903, and submitted by the plaintiff in opposition to the motion to set aside the service of the summons in the above case, viz.:

"That at the date of the service of the summons in this action upon said J. C. Stubbs, a director of the defendant on the 10th day of April, 1903, the above named defendant, Central Pacific Railroad Company, had, and still has, property within the State of New York, to-wit: a large claim against the estate of said Collis P. Huntington, and the executors of said last will and testament."

I deny said allegations and each of them.

Referring to the allegation of said Frederick H. Remington, counsel for the plaintiff above named, that an action had been brought in the supreme court of the State of New York by one Walter Morshead on behalf of the stockholders of the Central Pacific Railroad Company, I have to say that on the 29th day of August, 1902, there was served upon me a summons in this action, but that, as I am informed and believe, said summons has not been served upon any of the other defendants therein. I attach hereto, as part of this affidavit, a copy of the complaint and of my answer in said action, marked Exhibits "A" and "B." This action has never been pressed for trial by the plaintiff and has never even been put upon the calendar of the court.

The capital stock of the Central Pacific Railroad Company amounts in the aggregate to about 672,755 shares of which the Southern Pacific Company has heretofore acquired stock to the amount of upwards of 671,500 shares, most of this stock having been acquired in connection with the Central Pacific read-

64 justment of 1899. The whole amount of capital stock of the Central Pacific Railroad Company, not acquired by the Southern Pacific Company, is less than 800 shares.

As I am informed and verily believe, no stock of the Central Pacific Railroad Company ever stood in the name of or was ever transferred upon the books of the said company to the plaintiff, Hiram Remington.

I. E. GATES.

Subscribed and sworn to before me this 24" day of June, 1903.

CHARLES FRANKLIN,
[NOTARIAL SEAL.] *Notary Public* 127, *New York County.*

65 EXHIBIT "A."

Supreme Court of the State of New York, City and County of New York.

WALTER MORSHEAD, on Behalf of the Stockholders of the Central Pacific Railroad Company, Plaintiff,
*against*
CHARLES H. TWEED, ISAAC E. GATES, ARABELLA HUNTINGTON, as Executors of Collis P. Huntington, and The Central Pacific Railroad Company, Defendants.

The plaintiff herein by Robert L. Cutting, his attorney, complains of the defendants, and shows:—

I. That the plaintiff is the owner and holder of one hundred shares of the capital stock of the Central Pacific Railroad Company, which stands in his name on the stock books of said company, and has so stood for about eight years last past, and that he is the owner of other shares of the said Central Pacific Railroad stock which is held in trust for him, and that plaintiff is a resident of the State of New York. That he brings this action on behalf of holders of other shares of stock in the Central Pacific Railroad Company similarly situated, and at the special request of some thereof. That Charles H. Tweed, Isaac E. Gates, and Arabella Huntington are the duly qualified executors of the estate of Collis P. Huntington as hereinafter set forth. That the Central Pacific Railroad Company is a foreign railroad corporation created by and organized under the laws of the State of California.

66 II. That the plaintiff has duly made demand in writing on the officers and directors of the said Central Pacific Railroad Company, that they institute legal proceedings for the cause of action stated in this complaint. But that the said Central Pacific Railroad Company has not instituted, so far as this plaintiff knows, any said legal proceedings against these individual defendants. That the said Huntington during his lifetime was an officer and director of the said Central Pacific Railroad Company and, as plaintiff is informed and believes, the said Tweed and Gates were, and still are, officers of the said Central Pacific Railroad Company. And, as the plaintiff is informed and believes, the said Huntington and associates in the transactions hereinafter set forth, controlled the board of directors of the said Central Pacific Railroad Company during the said Huntington's lifetime, and that since the death of the said Huntington the said Tweed and associates have, and do now, influenced by him,

control and dominate the said board of directors of the said Central Pacific Railroad Company to such an extent that, as this plaintiff is informed and verily believes, no attempt has been or will be made to establish the liability of the said Huntington, or for the recovery from the estate of the said Huntington of the sums of money for which the said Huntington was liable by his acts as set forth in this complaint. That no corporate meeting of the said Central Pacific Railroad Company has been held, nor have any new officers been elected, since the year 1899, though the said corporation has never been dissolved.

III. That the Central Pacific Railroad Company is a railroad corporation organized under the laws of the State of California and that said Central Pacific Railroad Company received large loans and subsidies from the United States of America in bonds amount-
67 ing in the aggregate to some thirty millions of dollars in value, more or less, for the construction and equipment of its said railroad.

IV. That the said Collis P. Huntington, together with Leland Stanford, Charles Crocker and Mark Hopkins were directors and officers of the said Central Pacific Railroad Company, and to the time of their decease they were, as plaintiff is informed and believes, in control of the corporate affairs of the said Central Pacific Railroad Company. And the said Collis P. Huntington was, in addition, the financial agent of the said Central Pacific Railroad Company in New York city and in Washington, D. C., and until the year 1899 held a general power of attorney to transact all the corporate business of the said railroad company in said places as its general agent.

V. That, as the plaintiff is informed and believes, the said Huntington and his associates, the said Stanford, Crocker and Hopkins, organized or caused to be organized certain companies known as the Contract and Finance Company, the Western Development Company, the Pacific Improvement Company, the Pacific Express Company, the Rocky Mountain Coal Company, and other companies, which companies were personally owned or controlled, through the ownership of the stock thereof, by the said Huntington and his said associates, either personally or by and through their agents, dummies and accomplices. And the said Huntington and his said associates, used the names, corporate forms, and instrumentalities of these said companies to agree with themselves, acting in the name of the said Central Pacific Railroad Company and on its behalf, for the construction, equipment, and repairing of said railroad, and for the purchase and leasing of branch and auxiliary lines of railroad, and for the purchase of coal and materials for the said rail-
68 road company, and for doing the express business of the said railroad company, and for other purposes. And the said Huntington and his associates, while in control of the said Central Pacific Railroad Company, as its officers, directors and agents, were also at all times interested in the results of the said contracts made

between the said Central Pacific Railroad Company and the other said companies, through their ownership of the stocks of the said companies.

VI. And that in pursuance of these fraudulent arrangements, as the plaintiff is informed and believes, the said Huntington and his associates from time to time delivered to themselves, through the instrumentalities of the said companies named in paragraph V herein, the whole or a greater part of the thirty million dollars' worth of the aforesaid United States bonds and likewise the whole or a greater part of the bonds and capital stock of the said Central Pacific Railroad Company, to the total value, as the plaintiff is informed and believes, of upwards of one hundred and sixty-three millions of dollars, which bonds and stocks were obtained in pretended payment to the companies aforesaid for the purposes set out in paragraph V of this complaint. And the plaintiff herein is informed and believes that the construction of the said Central Pacific Railroad Company's railroad and of all its constituent, leased and auxiliary lines did not actually cost more than sixty millions of dollars. So that the pretended payments to the aforesaid companies on alleged construction and other contracts and for other purposes, were fraudulent, grossly excessive, collusive, and in violation of the duties of the said Huntington and his associates as officers, directors, and agents of the said Central Pacific Railroad Company; and the plaintiff alleges on information and belief that the said United States bonds and the bonds and stock of the said Central Pacific Railroad Company were actually converted to
69 their own use or uses by the said Huntington and his said associates through the colorable and fraudulent devices herein set forth.

VII. And as this plaintiff is informed and believes, the said Huntington, from the beginning of the frauds and devices herein alleged and throughout their pendency for the most part directed and managed these schemes and conspiracies to plunder the said Central Pacific Railroad Company, which schemes and conspiracies were consummated and resulted in the conversions set forth more particularly in paragraphs V and VI of this complaint. The said Hopkins died in the year 1878, the said Crocker died in the year 1888, and the said Stanford died in the year 1893. But, as this plaintiff is informed and believes, the conversions of the property of the said Central Pacific Railroad Company and the other illegal and fraudulent acts herein alleged, or some of them, were continued by the said Huntington down to the time of his death in August, 1900.

VIII. That the said Collis P. Huntington departed this life on August 13th, 1900. That his will was proved and letters testamentary were duly issued to his executors, the defendants herein, to-wit: Charles H. Tweed, Isaac E. Gates, and Arabella Huntington, on October 15th, 1900, by the surrogate of New York county.

Wherefore, the plaintiff prays,—that the said executors, the de-

fendants herein, be decreed to account for the profits made by their said decedent, Collis P. Huntington, as set out in this complaint, and that the said executors pay the said profits with legal interest, to the Central Pacific Railroad Company for the benefit of its stockholders.

And the plaintiff further prays for an order that the said executors, defendants herein, be enjoined by this court from paying out, distributing, or in any way disposing of or parting with the assets of the said estate of their said decedent, Collis P. Huntington, until the amounts owing to the Central Pacific Railroad Company be ascertained and adjudged, or until the further order of this court.

That the plaintiff have such other, further and different relief, as to the court may seem just.

ROBERT L. CUTTING,
*Plaintiff's Attorney.*

Office and post office address, 41 Park row, New York city.

KINGDOM OF GREAT BRITAIN AND IRELAND, *County of London,* } *ss.:*

Walter Morshead, being duly sworn, deposes and says: That he is the plaintiff in the above entitled action: that he has read the foregoing complaint and knows the contents thereof: that the said complaint is true to his own knowledge, except as to the matters herein stated to be alleged on information and belief and as to the said matters he believes them to be true.

W. MORSHEAD.

Sworn to before me at 47 Essex street Strand, London, this 8th day of October, 1902.

W. B. GLASIER,
*A Commissioner for Oaths for the State of New York.*

EXHIBIT "B."

Supreme Court of the State of New York, City and County of New York.

WALTER MORSHEAD, on Behalf of the Stockholders of the Central Pacific Railroad Company, Plaintiff,
*against*
CHARLES H. TWEED, ISAAC E. GATES, and ARABELLA HUNTINGTON, as Executors of Collis P. Huntington, and The Central Pacific Railroad Company, Defendants.

Isaac E. Gates, as executor of Collis P. Huntington, one of the defendants in the above entitled action, appearing therein by Max-

well Evarts, his attorney, answers the complaint of the plaintiff therein as follows:

First. He has no knowledge nor information sufficient to form a belief, as to the allegations contained in subdivision I of the complaint or any thereof, and controverts the same and each of them, except that he admits that Arabella D. Huntington, Charles H. Tweed and himself, are the duly qualified executors of the estate of Collis P. Huntington, and that the Central Pacific Railroad Company is a foreign railroad corporation, created by and organized under the laws of the State of California.

Second. He denies that he, or his co-defendant Charles H. Tweed, is now an officer of the Central Pacific Railroad Company, and he has no knowledge nor information sufficient to form a belief, as to the other allegations contained in subdivision II of said com-
72 plaint or any of them, and therefore controverts the same and each of them, except that he admits upon information and belief, that the Central Pacific Railroad Company has not instituted any legal proceedings against the executors of the estate of Collis P. Huntington, and that the said Huntington, during a portion of his lifetime, was an officer and director of the Central Pacific Railroad Company, and that this defendant Isaac E. Gates was an officer of said railroad company from 1889 to 1898 (except perhaps for a single year).

Third. He denies upon information and belief, that any loans or subsidies to the Central Pacific Railroad Company from the United States of America amounted in the aggregate to thirty millions of dollars in value or any such sum.

Fourth. Upon information and belief, he denies the allegations contained in subdivision IV of the complaint and each of them, except that he admits that the said Collis P. Huntington, Leland Stanford, Charles Crocker and Mark Hopkins, were directors and officers of the said Central Pacific Railroad Company, and except that he admits that the said Collis P. Huntington was the financial agent of the Central Pacific Railroad Company in New York city and Washington D. C. and upon information and belief, he avers that the board of directors of the Central Pacific Railroad Company was always in control of the Central Pacific Railroad Company and its corporate affairs.

Fifth. Upon information and belief, he denies the allegations contained in subdivision V of said complaint and each of them, except that he admits that said Huntington, Stanford, Crocker and Hopkins organized or caused to be organized certain companies known as the Contract & Finance Company, the Western
73 Development Company, the Pacific Improvement Company, and the Rocky Mountain Coal & Iron Company, and that the said Huntington, Stanford, Crocker and Hopkins were stockholders in said companies, and as such stockholders were interested in the results of the contracts made between the Central Pacific Railroad Company and said companies hereinbefore mentioned.

Sixth. Upon information and belief, he denies the allegations contained in subdivision VI of said complaint and each thereof.

Seventh. Upon information and belief, he denies the allegations contained in subdivision VII of said complaint and each of them, except that he admits and avers upon information and belief, that Mark Hopkins died in the year 1878, Charles Crocker in the year 1888 and Leland Stanford in the year 1893.

Eighth. And this defendant further answering upon information and belief, says, that long prior to the institution of this action, or any purchase by the plaintiff of any stock of the Central Pacific Railroad Company, the Central Pacific Railroad Company at meetings of its stockholders duly called and held, and without dissentient vote, approved, ratified and confirmed the acts and proceedings of its board of directors, in respect to making or carrying into effect any contracts made between the Central Pacific Railroad Company, and any of the other companies referred to in said complaint, and all acts and doings of C. P. Huntington, Leland Stanford, Charles Crocker, Mark Hopkins and their associates, while acting as directors of the Central Pacific Railroad Company.

Ninth. And this defendant further answering upon information and belief, by way of a further and separate defense to said action, says, that any cause of action which may have accrued for or
74 in respect of any of the matters referred to in the complaint, accrued more than six years before the institution of this action, and is barred by the statutes of limitations of the State of New York.

Tenth. And this defendant, further answering upon information and belief, says, by way of further and separate defense to said action, that any cause of action which may have accrued for or in respect of any of the matters referred to in the complaint, accrued more than ten years before the institution of this action, and is barred by the statute of limitations of the State of New York.

Eleventh. This defendant further answering, specifically denies all charges contained in the complaint herein of fraud, collusion, or violation of duty or improper action on the part of said Huntington, Stanford, Crocker and Hopkins, on account of the contracts between the Central Pacific Railroad Company, and other corporations referred to or intended to be referred to in the complaint or otherwise.

Wherefore, this defendant prays that the said complaint may be dismissed with costs.

MAXWELL EVARTS,
*Attorney for Defendant, I. E. Gates.*

23 Broad street, New York city, Borough of Manhattan.

STATE OF NEW YORK, }
*City and County of New York,* } ss:

Isaac E. Gates, being duly sworn, deposes and says, that he is one of the executors of the estate of Collis P. Huntington, deceased, and

one of the defendants in the above entitled action. That he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

I. E. GATES.

Subscribed and sworn to before me this 5th day of December, 1902.

[NOTARIAL SEAL.] CHARLES FRANKLIN,
*Notary Public* (127), *New York County.*

75 At a special term of the supreme court held at the court house in the city of Watertown, N. Y., June 9th, 1903.
Present: Hon. M. L. Wright, justice presiding.

Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

A motion having been made to set aside the service of the summons in the above-entitled action, and now coming on for argument and after hearing Henry Purcell, of counsel for the defendant, in support of said motion, and John N. Carlisle, Esq. of counsel for the plaintiff, in opposition thereto, and counsel for the defendant having asked that defendant be permitted to serve additional affidavits in support of said motion, it is

Ordered, that the defendant may serve such additional affidavits on the plaintiff's attorneys on or before July 1st, 1903, and that said motion be postponed and heard at special term, to be held by Mr. Justice Andrews at Syracuse, N. Y., July 11th, 1903.

Enter.
M. L. W.
J. S. C.

76 Supreme Court.

HIRAM REMINGTON
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

It is hereby stipulated, that the motion made in the above entitled action for Utica special term on May 16th, 1903, be continued, by stipulation, to the Jefferson special term appointed to be held at the court house in the city of Watertown, N. Y., on June 9th, 1903,

with the same force and effect as if the motion had originally been noticed for hearing at such term.

Dated, May 25th, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*
PURCELL, WALKER & BURNS,
*Defendant's Attorneys for the Purposes of the Motion.*

77 STATE OF NEW YORK,
*Office of Secretary of State.*

ALBANY, *June* 1, 1903.

I hereby certify that I have made diligent examination in this office for a statement under section 16, of the general corporation law and a designation by the Central Pacific Railroad Company of a person upon whom summons may be served in this State pursuant to section 432 of the Code of Civil Procedure (the custody of such designation, if any such there be, legally belonging to me,) and that upon such examination I find no such statement or designation by said corporation on file in this office. I further certify that no certificate of authority authorizing said corporation to do business in this State, has been issued.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, the day and year first above written.

[SEAL.] HORACE G. TENANT,
*Second Deputy Secretary of State.*

78 In Supreme Court, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of New York,* } *ss:*

Ellis L. Aldrich, being duly sworn, says that he resides at the city of New York, N. Y., and is over the age of twenty-one years. That on the 10th day of April, 1903, he personally served a copy of the annexed summons upon J. C. Stubbs at 120 Broadway in the borough of Manhattan, city of New York, N. Y., by personally delivering to and leaving with the said J. C. Stubbs a true copy of the said summons.

That as deponent is informed and verily believes, the said defendant, Central Pacific Railroad Company, is a foreign corporation, and that the said J. C. Stubbs is and was at the time of said service a director of The Central Pacific Railroad Company the defendant named in the above entitled action.

That deponent further says that he used due diligence to obtain service of the said summons upon an officer of said defendant within the State of New York, but that no president, treasurer or secretary or officers performing corresponding functions under another name could be found by deponent within the State of New York.

That deponent has called at the office of the Southern Pacific Railroad Company in the borough of Manhattan, city of New York, N. Y., and was there informed that that was also the office of the defendant, Central Pacific Railroad Company. That deponent was further informed at the said office that none of the officers
79 of the defendant, Central Pacific Railroad Company, resided or had his place of business in the State of New York, but that all of the officers of the said Central Pacific Railroad Company resided and had their places of business in the western part of the United States without the State of New York on the 10th day of April, when the said service was made.

ELLIS L. ALDRICH.

Sworn to before me this 15th day of May, 1903.

FREDERICK C. SIMMS.
*Notary Public, No. 324, New York County.*

80 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*City and County of New York,* } ss:

Ellis L. Aldrich being duly sworn deposes and says that he resides at the city of New York, New York, and is over the age of twenty-one years. That on the 10th day of April, 1903, he personally served the annexed summons in the above entitled action upon the defendant, Central Pacific Railroad Company, which as deponent is informed and verily believes is a foreign corporation, by personally delivering to and leaving with J. C. Stubbs, who as deponent is informed and verily believes was then a director of the said corporation, a true copy of the said summons at 120 Broadway in the borough of Manhattan, city of New York, N. Y.; that at the time deponent served the said summons as aforesaid he knew the said Central Pacific Railroad Company to be the same person mentioned and described in the said summons as defendant therein.

The deponent further says that before making the service on the

said J. C. Stubbs as director of the said defendant, he was informed by Brown, Carlisle and Hugo, plaintiff's attorneys, that from certain investigations made on behalf of the plaintiff by F. H. Remington, it appeared that all of the officers of the said defendant, Central Pacific Railroad Company, resided in San Francisco; that
81 J. L. Wilcutt, a secretary of the Central Pacific Railroad Company and N. T. Smith, treasurer of the Central Pacific Railroad Company, might be in New York city during the early part of April to attend a conference of persons representing the Southern Pacific Railroad Company with which they were connected. That on or about the 6th day of April, 1903, deponent sent Andrew Hunter, whose affidavit is hereto attached, to enquire at the office of the Southern Pacific Railroad Company, which is also the office of the Central Pacific Railroad Company, for J. L. Wilcutt and N. T. Smith, but that the said Andrew Hunter was there advised that the said Wilcutt and Smith were not expected in New York and that there was nothing to bring them here; that they very seldom came to New York from San Francisco.

That deponent on the 10th day of April, learned that J. C. Stubbs who as he was informed and verily believes was at that time a director in the Central Pacific Railroad Company, was in New York for a day and deponent thereupon served him as aforesaid.

That subsequently on the 13th day of May, 1903, deponent called at the office of the Central Pacific Railroad Company at 120 Broadway, borough of Manhattan, city of New York, and was there told by a person in the said office that all of the officers of the Central Pacific Railroad Company, on the 10th day of April, 1903, resided and had their places of business in the western part of the United States, without the State of New York, and that there were on the said 10th day of April, 1903, no persons within the State of New York, performing corresponding functions to the president, treasurer or secretary of the said Central Pacific Railroad Company under another name. That deponent did not search for a person designated under the second subdivision of section 432 of the Code of Civil Procedure for the purpose of serving said summons upon said person for the reason that no such designation had been made by
82 the said defendant as deponent is informed and verily believes.

ELLIS L. ALDRICH.

Subscribed and sworn to before me this 6th day of June, 1903.

FRANCIS A. HUNEKEN,
*Commissioner of Deeds for New York City.*

83 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of New York, City of New York,* } ss:

Andrew Hunter, being duly sworn, says, that on or about the 6th day of April, 1903, he was employed by Aldrich & Vandewalker, to make service of the summons in the above entitled action upon the defendant therein; that he proceeded on that day with said summons in his possession to the office of the Southern Pacific Railroad Company at 120 Broadway, Manhattan, New York city, which said office is also the office of the Central Pacific railroad, in New York, and made inquiries in said office for J. C. Wilcutt the secretary and N. T. Smith the treasurer of said Central Pacific Railroad Company but that deponent was there informed that neither said Wilcutt nor said Smith were in New York, but that they resided and had their places of business in the city of San Francisco, in the State of California; that neither of them were expected to come to New York and that they very seldom came East from San Francisco; that deponent reported the result of his effort to serve said paper to said Aldrich & Vandewalker.

ANDREW HUNTER.

Sworn to before me this 8th day of June, 1903.

WILLARD S. ALLEN,
*Notary Public, New York County.*

84 STATE OF NEW YORK:

In Supreme Court, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

COUNTY OF NEW YORK, ss:

Augustus T. Gillender, being duly sworn, says that he is an attorney and counsellor at law with offices at 141 Broadway in the borough of Manhattan, city of New York; that he is also attorney in fact for G. Emily Reynolds, the owner of the certificate of stock of the Central Pacific Railroad Company, a copy whereof is hereto

attached; that as such attorney in fact he has now in his possession the said original certificate; that he has carefully examined the copy of the said certificate hereto attached and that the same is a true copy of the original certificate in his possession.

AUG. T. GILLENDER.

Sworn to before me this 26th day of June, 1903.

KATHERINE MacMAHON,
*Notary Public*, 116, *N. Y.*

85 No. D. 66484. 10 shares.

This is to certify that G. Emily Reynolds, is entitled to ten (10) shares of one hundred dollars each in the capital stock of the Central Pacific Railroad Company, transferable only on the books of the said company at the city of New York upon the surrender of this certificate and all unpaid dividend warrants belonging thereto. This certificate is not valid without the signature of the registrar and transfer agent.

Any dividends that may be declared or become payable upon the stock represented by this certificate will be paid only upon presentation and surrender of the annexed dividend warrants corresponding in number with the dividend so declared and to the bearer of said warrants.

In witness whereof the said company has caused this certificate to be signed by its president and secretary this 15th day of July, 1890, and to be countersigned by its registrar and transfer agent.

CHAS. CROCKER,
*3d Vice President.*

E. H. MILLER, JR., *Secretary.*

Countersigned this 16th day of July, 1890.

GEO. WATKINS,
*Transfer Agent.*

Countersigned and prior certificate cancelled this 16th day of July, 1890.

FOURTH NATIONAL BANK OF NEW YORK, *Registrar*,
By CHAS. PATTERSON, *Ca.*

Central Pacific Railroad Company.

*Dividend Warrant No.* 29.

The bearer is entitled to the twenty-ninth dividend on ten (10) shares of the capital stock of this company represented by certificate No. D. 66484, payable in the city of New York, and elsewhere as may be designated by said company.

E. H. MILLER, JR.

Warrants No. 29, 30, 31, 32, 33 & 34 are attached.

For value received —— —— hereby sell, assign and transfer unto —— —— — shares of the stock represented by the within certificate- and do- hereby irrevocably constitute and appoint —— —— attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.

Dated —— 18—.

—— ——.

In the presence of

—— ——.

86 In Supreme Court, Jefferson County.

HIRAM REMINGTON
*v.*
CENTRAL PACIFIC RAILROAD COMPANY.

STATE OF NEW YORK, *County of Kings,* } *ss:*

George Watkins, being duly sworn, says that he resides at No. 656 Nostrand avenue in the borough of Brooklyn in the city and State of New York, and that from about May, 1882, to about 1897 he acted as the transfer agent in New York city, in the State of New York, for the Central Pacific Railroad Company. That the office of said company was, during that period, in the Mills building, Broad street, in said city, that said office was the general financial office of said company in New York city.

That the said company kept in said office the necessary books for the transfer of its stock, and that deponent had charge of said books. That deponent, acting as such transfer agent, would receive certificates of stock of said company, properly endorsed and assigned, would note the transfer of said certificate on the transfer register, and would thereupon give to the person surrendering said certificate a new certificate or certificates for a like amount of stock in the place of said certificate so surrendered.

That said new certificates were registered by the Fourth National Bank of the City of New York, which acted as registrar of said Central Pacific Railroad Company during said period, and were dated and countersigned by deponent as such transfer agent.

GEO. WATKINS.

Sworn to before me this 2nd day of July, 1903.

[SEAL.] WM. G. ANDERSON,
*Notary Public, 76, Kings Co., N. Y.*

87 In Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

STATE OF NEW YORK, *City & County of New York,* } ss:

Charles H. Patterson, being duly sworn, says he resides at the city of New York, and is the cashier of the Fourth National Bank of said City of New York, and has acted first as assistant cashier and then as cashier of said bank since 1882.

Deponent further says that when he became connected with said bank in 1882, the said Fourth national bank was acting as registrar of the stock of the Central Pacific Railroad Company, and continued to act in that capacity down to about the year 1897, and during said years as aforesaid, the said Central Pacific Railroad Company maintained an office at No. 15 Broad street in the city of New York, and that it employed at that office one George Watkins, as its New York transfer agent, and that I. E. Gates, a vice-president of said Central Pacific Railroad Company, was also one of the occupants of said office. That most of the certificates registered by the said Fourth National Bank of the City of New York came from said office No. 15 Broad street, countersigned by the said George Watkins, and that when said certificates had been registered by said bank they were returned by it to the said office of the Central Pacific Railroad Company at No. 15 Broad street, New York city.

Deponent further says that he has examined the books of the Fourth national bank as aforesaid, and finds items entered in said books showing that said bank acted as registrar for the said Central Pacific Railroad Company from about 1872 down to about 1897.

CHARLES H. PATTERSON.

Sworn to before me this 2nd day of July, 1903.

[SEAL.] R. A. PIPER,
*Notary Public, Kings County.*

Certificate filed in New York county.

88 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF WISCONSIN, *Milwaukee County*, } ss:

Frederick H. Remington, being first duly sworn, on oath deposes and says that he is counsel for the plaintiff in the above-entitled action, and the same person who made affidavits in said action dated the 16th day of May, 1903, and the 28th day of May, 1903; that the false and fraudulent representations made by the defendant and caused to be published by the defendant mentioned in said affidavit of affiant dated the 16th day of May, 1903, were contained in a report or article concerning the Central Pacific Railroad Company and entitled "Central Pacific railroad," published in a book entitled "Manual of the Railroads of the United States for 1880," "By Henry V. Poor," "13th annual number," "New York, H. V. and H. W. Poor, 19 Broad street;" that said book was copyrighted by said H. V. and H. W. Poor and was published by them in the city of New York, State of New York, in the year 1880; that said manual consists of a compilation of information concerning the various railroad companies of the United States which has been published annually in the city of New York since 1867, and is a standard publication which has at all times since its first publication been generally used by dealers in railroad stocks for the purpose of obtaining information concerning the affairs and financial condition of the various railroads in the United States; that among other things the said article concerning the Central Pacific railroad contained the following:

89 "*General Balance December 31st*, 1879.

| | |
|---|---|
| Railroad and appurtenances | $135,021,029.02 |
| Rolling stock | 3,030,468.77 |
| Real estate and buildings | 2,549,297.52 |
| Materials and fuel | 2,226,428.14 |
| Stocks and bonds | 982,184.68 |
| Bills receivable | 1,021,363.36 |
| Accounts | 5,423,693.89 |
| Cash on hand | 540,966.76 |
| Sinking fund | 4,068,662.90 |
| Other property and assets | 1,489,644.82 |
| | $161,353,739.86 |

| | |
|---|---|
| Capital stock | $54,275,500.00 |
| Funded debt | 57,030,000.00 |
| Bills payable | 4,212,960.86 |
| Other liabilities | 1,131,605.39 |
| Current accounts | 1,465,455.00 |
| Profit and loss | 15,382,538.61 |
| U. S. subsidy bonds | 27,855,680.00 |
| | $161,353,739.86" |

That the plaintiff claims that the said general balance was false and fraudulent in omitting entirely an item of $19,271,111.41 for accrued interest on the Government loan of subsidy bonds, in including the item showing a profit, to-wit: "Profit and loss $15,382,538.61;" and in including in the items "Railroad appurtenances, $135,021,029.02" and "Capital stock, $54,275,500." about $52,000,000 of stock for which the company had received no consideration and which had been issued in violation of law and charged to railroad and appurtenances and credited to capital stock as if fully paid; that if the said item of $19,271,111.41 accrued interest had been included in said general balance it would have more than offset the said item showing a profit of over $15,000,000, and would have shown a loss of about $4,000,000, which would have appeared upon the other side of the balance sheet; that affiant expects that the plaintiff will be able to prove upon the trial of this action beyond any controversy that the said item of accrued interest was owing and unpaid by the defendant to the United States on the 31st day of December, 1879, and expects to be able to prove that said item of about $52,000,000 of stock was wholly unpaid and fictitious; that the plaintiff also expects to be able to
90 prove upon such trial that the said article concerning the Central Pacific Railroad Company published as aforesaid was furnished by the defendant to the editor and publishers of said manual for the purpose of having the same published in said manual and knowing that the same would be so published; that about the 1st of January, 1903, affiant called at the office of the publishers of said Poor's Manual in the city of New York and inquired of the person in charge of said office if all information contained in the manual was received directly from the various companies concerning which the information was given, and said person then informed affiant that such information in all cases was received directly from the respective companies unless it was otherwise noted in the articles concerning the respective companies; that there is nothing in the said article concerning the Central Pacific Railroad Company indicating that it was not furnished by the defendant, but upon the other hand there are certain things in the said manual indicating that the said information contained in said article was furnished by the defendant; among other things, it appears in the said article that certain lines of road were leased to the defendant by other companies, and in the articles in said manual concerning several of said

leased roads, under the head of "Operations for the year ending December 31, 1879," is the following: "Included in lessee's returns;" that in various places throughout the manual, in articles concerning other railroad companies, are statements showing that the companies refused to furnish information, or had failed to furnish information; that there is nothing of this kind in the said article concerning the Central Pacific Railroad Company, and the information in said article is given in such detail that to all appearances it could have been furnished only by the defendant.

That the foregoing are some of the reasons why affiant expects that the plaintiff will be able to establish upon the trial that
91 the said article was furnished by the defendant to the editor and publishers of said Poor's Manual to be published in said 13th annual number of said manual; that prior to the purchase of capital stock of the defendant corporation by the plaintiff, the plaintiff consulted with affiant in regard thereto, and affiant knows that the plaintiff before making such purchases consulted the said volume of Poor's Manual and read the said article concerning the Central Pacific Railroal Company, and particularly the said general balance, and that the plaintiff relied upon the information contained in said article and especially upon said general balance, in making the said purchases;

That from early in January, 1903, until the service of the summons in this action upon J. C. Stubbs, a director of the defendant, on the 10th day of April, 1903, affiant made diligent search and inquiry for the president, vice-president, secretary, assistant secretary, treasurer and assistant treasurer of the defendant for the purpose of finding one of said officers in the State of New York and having the summons in said action served upon such officer, but affiant was unable to find said officers or any thereof in the State of New York; that affiant made such search and inquiry by inquiring of various persons in New York city who would be liable to know the whereabouts of said officers and by corresponding with an attorney at law residing at San Francisco, California, who made inquiries concerning such officers in said city of San Francisco.

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 2nd day of July, 1903.

JOHN H. HURLEY,

[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

My commission expires August 7, 1904.

STATE OF WISCONSIN, *County of Milwaukee,* } ss:

Office of the clerk of the circuit court.

I, A. A. Wieber, clerk of the circuit court of the county of Milwaukee, in the State of Wisconsin, the said court being a
92 court of record and having a seal, do hereby certify that John H. Hurley, Esquire, whose name appears subscribed to the annexed instrument, was at the date thereof a notary public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said State to administer oaths, take depositions, and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such full faith and credit is and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to be his, is genuine; that the seal hereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said county and State, on the 2nd day of July, one thousand nine hundred and three.

A. A. WIEBER,
*Clerk of Circuit Court.*

[SEAL.]

93 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF WISCONSIN, *Milwaukee County,* } ss:

Frederick H. Remington, being first duly sworn, on oath deposes and says that he is counsel for the plaintiff in the above-entitled action and the same person who made an affidavit in this action dated the 16th day of May, 1903; that the plaintiff is, and has been for many years last past, a resident of Jefferson county, State of New York; that affiant wrote the letter in the month of January, 1903, to the secretary of state of the State of New York mentioned in the said former affidavit, for the purpose of ascertaining whether there was

any person in the State of New York upon whom a summons could be served in this action, and from the early part of January, 1903, until the service of the summons in this action on J. C. Stubbs, a director of the defendant, on the 10th day of April, 1903, affiant made diligent inquiry for some officer of the defendant of the classes mentioned in the first subdivision of sec. 432 of the Code of Civil Procedure of the State of New York, who might be within the State of New York, for the purpose of having the summons in this action served upon such officer, but was unable to find any such officer of the defendant in the State of New York; that Collis P. Huntington, hereinafter mentioned, ever since the incorporation of the above-named defendant in 1861, and until his death on or about the 13th day of August, 1900, was a resident of the city of New York, State
94 of New York; that the last will and testament of said Collis P. Huntington was duly admitted to probate by the surrogate of New York county, New York, on or about the 15th day of October, 1900, and that letters testamentary were thereupon duly issued by said surrogate to the executors named in said last will and testament, to wit: Charles H. Tweed, Isaac E. Gates and Arabella Huntington; that said persons are acting as such executors and each of said persons resides in the said city of New York, and did so reside on the 10th day of April, 1903; that the said Collis P. Huntington was a director in and vice-president of the defendant corporation and financial agent of the said defendant from its incorporation in 1861 until in or about the year 1899; that at the date of the service of the summons in this action upon said J. C. Stubbs, a director of the defendant, on the 10th day of April, 1903, the above named defendant Central Pacific Railroad Company had, and still has, property within the State of New York, to wit: a large claim against the estate of said Collis P. Huntington and the executors of said last will and testament, as affiant is informed and verily believes, after having made a careful study of the facts relating to said claim; that an action is now pending and undetermined in the supreme court of the State of New York in and for New York county, wherein one Walter Morshead, a stockholder in the defendant corporation, is plaintiff, and said executors above named and said Central Pacific Railroad Company are defendants; that the said action is brought by the said Morshead on behalf of the stockholders of the Central Pacific Railroad Company; that affiant has read the pleadings and other papers in said action; that said action was commenced by service of a summons on said Isaac E. Gates, one of said executors, and on the said Central Pacific Railroad Company on the 29th day of August, 1902; that the complaint was verified by the plaintiff on October 8, 1902, and the answer of said Isaac E. Gates as such executor was verified on the 5th day
95 of December, 1902; that it appears from the complaint in said action that the said action is brought to compel the said executors to account for a large amount of profits alleged to have been made by their said decedent, Collis P. Huntington, while

acting as vice-president, director and financial agent of the said Central Pacific Railroad Company, and which are alleged in said complaint to belong to said company, and to compel the said executors to pay the said profits with interest thereon to the said Central Pacific Railroad Company for the benefit of its stockholders.

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 28th day of May, 1903.

CHAS. E. WILD,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

My commission expires Oct. 16, 1904.

STATE OF WISCONSIN, }
*County of Milwaukee,* } ss:

Office of the clerk of the circuit court.

I, A. A. Wieber, clerk of the circuit court of the county of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Charles E. Wild, Esquire, whose name appears subscribed to the annexed instrument, was, at the date thereof, a notary public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said State to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the laws of nations, or according to commercial usage, may be performed by notaries public, and that to his acts and attestations as such full faith and credit is and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature, purporting to be his, is genuine; that the seal hereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said county and State, on the 28th day of May, one thousand nine hundred and three.

A. A. WIEBER,
*Clerk of Circuit Court.*

96 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK, *Jefferson County,* } ss.:

Hiram Remington, being first duly sworn, on oath deposes and says that he is the plaintiff in the above entitled action; that the shares of capital stock in the defendant corporation, certificates for which had been issued by the above named defendant and transferred to the plaintiff, as stated in plaintiff's affidavit herein, dated the 19th day of May, 1903, were transferred to the plaintiff in the manner hereinafter stated; that the certificates for said stock issued by the defendant had printed upon the back of each thereof a blank assignment and power of attorney substantially in the following form, to-wit:

"For value received — hereby sell, assign and transfer unto —— —— — shares of the stock represented by the within certificate and do irrevocably constitute and appoint —— —— attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.

Dated —— — 18—

—— ——.

In presence of
—— ——."

That the plaintiff purchased the said stock in the open stock market in the city of New York at the market prices at the times of the respective purchases, through the agency of others, and paid for the same in said city of New York upon the delivery to affiant or his agents in said city of New York of said certificates representing said stock; that when the said certificates of stock were delivered as aforesaid,
97 the blank assignments and powers of attorney on the back thereof, as aforesaid, were signed in blank by the persons to whom such certificates had been issued by the defendant; that the plaintiff did not have the said stock transferred to him on the books of the defendant, but held the said certificates with the said blank assignments and powers of attorney endorsed thereon, and signed as aforesaid until the said stock was sold by the plaintiff, when he caused the said certificates with said assignments and powers of attorney to be delivered to those who purchased said stock from him, in the same form in which he received them, with the

exception that certain dividend warrants which had been paid to plaintiff had been detached therefrom; that said certificates had attached thereto certain dividend warrants which were numbered and had been attached to said certificates of stock by the defendant for the purpose of enabling a purchaser of such stock to collect from the defendant any dividends which might be declared upon such stock by detaching and surrendering to the defendant the dividend warrants corresponding in number with the dividends so declared, without having the stock transferred to the name of such purchaser upon the books of the defendant; that while the plaintiff held the said stock purchased as aforesaid, certain dividends were declared thereon by the defendant and the same were paid by the defendant to plaintiff's agents who collected the same upon the surrender to the defendant of the dividend warrants corresponding in number with the number of such dividends, which warrants had been detached from said certificates; that the plaintiff does not now hold any of said stock; but sold the same some time before the commencement of this action at the then market prices for the same which prices were very much less than the prices paid by the plaintiff therefor and the plaintiff lost the difference in such prices besides interest, and has been damaged in the amount of such difference and interest; that the plaintiff claims and expects to prove upon the trial of this action that such loss and damage was caused by the frauds of the defendant; that the said frauds are briefly set forth in the affidavits of Frederick H. Remington
98 in this action dated, respectively, May 16th, 1903, and the 2nd day of July, 1903, and said frauds will be more particularly and fully set forth in the complaint in this action; that affiant did not discover the facts constituting the said frauds or any of them until long after the sale and transfer of said stock and certificates by him, and not until in or about the month of December, 1902; that in making the said purchases of said stock, the plaintiff relied upon all the stock of the defendant corporation having been fully paid and duly and legally issued, and relied upon the articles entitled "Central Pacific Railroad" published in the book entitled "Manual of the Railroads of the United States for 1880, by Henry V. Poor," "13th annual number," "New York, H. V. & H. W. Poor," 19 Broad street," and relied particularly upon the "General balance December 31st, 1879" included in said article, which general balance has been copied into the said affidavit of Frederick H. Remington herein, dated July 2nd, 1903, and appears on the 2nd page of said affidavit; that plaintiff had carefully read the said article in said manual before purchasing the said stock, and at the times of purchasing the said stock verily believed that the said article was in all respects true, and did not discover that the said article did not state the truth until in or about the month of December, 1902; that the plaintiff has been, at the several times mentioned in this affidavit, and still is, a resident of Jefferson county State of New York, and the defendant has at all times since its in

corporation been a non-resident of the State of New York; that the plaintiff expects to be able to prove upon the trial of this action the purchases and sale of said stock as aforesaid, the frauds of the defendant, that the plaintiff was damaged thereby, and all the facts constituting a good cause of action in favor of the plaintiff and against defendant, but objects and protests against the trial of the merits of the action upon affidavits upon a preliminary motion, and claims a right to a trial of this action upon oral testimony and documentary evidence to be duly produced in court after the plaintiff shall have served his complaint and the defendant shall have served its answer herein, or to a trial of any issue of law if the defendant shall elect to demur to such complaint when served.

HIRAM REMINGTON.

Subscribed and sworn to before me this 6th day of July, 1903.

LUCILLE R. BARON,
*Notary Public, Jefferson County, New York.*

99 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*Jefferson County, City of Watertown,* } ss:

Hiram Remington, being first duly sworn, on oath deposes and says that he is the plaintiff in the above entitled action; that the cause of action for which this action has been commenced arose in the State of New York; that said action is brought to recover damages arising and resulting from the purchase by the plaintiff of certain shares of the capital stock in the defendant corporation, certificates for which stock were issued by the defendant and transferred to the plaintiff upon the purchase of the same by him; that affiant purchased the said stock in the city of New York, State of New York, and paid for it in said city; and the said certificates of stock were transferred to him in said city; that the reason the plaintiff's complaint in said action is not presented upon the hearing of the motion made by the defendant to set aside the service of the summons in said action is that it is necessary for the person who is now preparing the said complaint to examine a large mass of documents and evidence contained in other matters in which the defendant was interested, for the purpose of properly drawing the complaint in this action and making the allegations thereof accurate

and in accordance with the facts; and the person so preparing the said complaint has not yet had sufficient time to prepare it.

HIRAM REMINGTON.

Subscribed and sworn to before me this 19th day of May, A. D. 1903.

LUCILLE R. BARON,
*Com. of Deeds, City of Watertown, N. Y.*

100 STATE OF NEW YORK:

Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF WISCONSIN,
*Milwaukee County,* } ss:

Frederick H. Remington, being first duly sworn, on oath deposes and says that he is an attorney and counselor-at-law duly admitted to practice as such in all the courts of the State of New York, and also in all the courts of the State of Wisconsin, and at present resides and practices law at the city of Milwaukee, Wisconsin; that he is a son of Hiram Remington, the plaintiff in the above entitled action, and is familiar with his business affairs; that he is counsel for the plaintiff in said action.

That the defendant, Central Pacific Railroad Company, is a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of California, and from the time of its incorporation until in or about the year 1900 kept and maintained an office for the transaction of business of said corporation in the city of New York, State of New York. That during part of said time the office of said company in the city of New York was at No. 23 Broad street, in said city, as any one may ascertain from directories of New York city or from Poor's Manual for 1899 and prior years; that said Poor's Manual is a book consisting of a compilation of information concerning the various railroad companies in the United States, which has been published annually in the
101 city of New York by H. V. and H. W. Poor for many years, and is a standard publication generally used by dealers in stocks.

That the cause of action for which the above entitled action is brought arose in the State of New York during the period that the said defendant maintained an office in said city of New York as aforesaid; that this action is brought for the purpose of recovering damages from the said Central Pacific Railroad Company, for issu

ing illegal and void certificates of the capital stock of said Central Pacific Railroad Company, and for making and causing to be published false and fraudulent representations concerning the capital stock represented by said certificates and concerning the affairs and condition of said Central Pacific Railroad Company, and concerning the consideration paid to said company for said stock, for the purpose of giving said capital stock represented by said certificates a fictitious value upon the market, and for the purpose of inducing the public to purchase said stock represented by said certificates; and upon the ground that said illegal, fraudulent and void certificates of stock were issued by the defendant in the State of New York, and that said false and fraudulent representations were made and published by the defendant in the State of New York; and upon the ground that the plaintiff, Hiram Remington, is and all the times herein mentioned was a resident of the State of New York, and that the said plaintiff, believing the said certificates of stock to be legal and properly issued, and believing that full consideration had been paid to the said defendant, Central Pacific Railroad Company, therefor, and relying upon the said certificates of stock being legal, valid and properly issued, and relying upon the said representations made as aforesaid being true, and induced by said belief and by said representations, purchased a large amount of said stock represented by said illegal and fraudulent certificates, which purchases were made by him in the city of New York, State of New York, and paid large sums of money for the same, which
102 payments were made by him in the city of New York, State of New York, and such illegal, fraudulent and void certificates were thereupon transferred to him in the city of New York, State of New York. And upon the ground that the said certificates were in fact worthless and well known to the defendant to be worthless when issued as aforesaid and when said representations were made and published as aforesaid; and that by reason of the said illegal, fraudulent and void issue of said certificates by the defendant, and by reason of said false and fraudulent representations, those of the same so purchased by the plaintiff greatly depreciated while they were held by him, and the plaintiff lost a large amount of money by reason of having purchased the said fraudulent and void certificates of stock as aforesaid, and was damaged in the amount of said loss by reason of the facts herein set forth and which will be more fully set forth in the complaint in this action.

That all the certificates aforesaid were issued by the defendant, Central Pacific Railroad Company, in the city of New York, State of New York.

That the defendant, Central Pacific Railroad Company, kept its books for the issue and transfer of capital stock of said company in the city of New York, and did so at the time of the issuing of the certificates aforesaid.

Affiant further says that he knows that said representations were published in the State of New York; that annexed hereto, marked

Exhibit "A" and made a part of this affidavit, is the form of stock certificate and dividend warrants which were issued by the defendant during the time it was doing business in the city of New York, State of New York, as aforesaid; that affiant copied said form from a stock certificate that had been issued by the defendant and is in the words of such certificate issued by it as aforesaid, except the blank spaces left therein; and with that exception, and with the exception that the name of the cashier of the Fourth national
103 bank (which was difficult to decipher) may not be correctly copied, the said Exhibit "A" is an exact copy of said stock certificate and dividend warrant thereto attached and the blank assignment endorsed thereon.

That it appears from said stock certificate and from said dividend warrants attached thereto that the capital stock of the said Central Pacific Railroad Company is transferable only on the books of said company in the city of New York; that it was countersigned by the Fourth National Bank of New York, registrar, and by George Watkins, transfer agent; and that the said warrants attached to said certificate were payable in said city of New York or elsewhere as may be designated by said company.

That in the month of January, 1903, affiant wrote to the secretary of state of the State of New York, at Albany, New York, for the purpose af ascertaining whether the said Central Pacific Railroad Company had designated any person in the State of New York upon whom summons could be served, pursuant to the provisions of the Code of Civil Procedure of the State of New York, and in reply to such letter affiant received from said secretary of state the communication hereto annexed marked Exhibit "B," from which it appears that said secretary of state was unable, after diligent examination in his office, to find any designation by the Central Pacific Railroad Company of a person upon whom summons may be served in the State of New York pursuant to section 432 of the Code of Civil Procedure of said State.

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 16th day of May, A. D. 1903.

[SEAL.] CHARLES E. WILD,
*Notary Public, Milwaukee County, Wisconsin.*

104 STATE OF WISCONSIN, } ss:
*County of Milwaukee,* }

Office of the clerk of the circuit court.

I, A. A. Wieber, clerk of the circuit court of the county of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Chas. E. Wild,

Esquire, whose name appeared subscribed to the annexed instrument, was, at the date thereof, a notary public within and for said State, residing in said county, duly appointed and qualified and empowered by the laws of said State to administer oaths, take depositions and acknowledgments of deeds, and perfrom such other duties as by the law of nations, or according to commercial usage, may be performed by notaries public, and that to his acts and attestations as such full faith and credit *is* and ought to be given in court and out. I further certify that I am well acquainted with the signature and handwriting of the aforesaid notary public, and I verily believe said signature purporting to be his is genuine; that the seal hereto attached is a correct impression of his official seal; and that said instrument is executed and acknowledged according to the laws of the State.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said county and State, on the 16th day of May, one thousand nine hundred and three.

[SEAL.]

A. A. WIEBER,
*Clerk of Circuit Court.*

105 EXHIBIT "A."

No. D. — shares.

This is to certify that —— —— is entitled to — shares of one hundred dollars each, in the capital stock of the Central Pacific Railroad Company, transferable only on the books of the said company in the city of New York upon the surrender of this certificate and all unpaid dividend warrants belonging thereto. This certificate is not valid without the signature of the registrar and transfer agent.

Any dividends that may be declared or become payable upon the stock represented by this certificate will be paid only upon presentation and surrender of the annexed dividend warrants corresponding in number with the dividend so declared and to the bearer of said warrants.

In witness whereof the said company has caused this certificate to be signed by its president and secretary this — day of —— and to be countersigned by its registrar and transfer agent.

CHAS. CROCKER,
*3rd Vice President.*

E. H. MILLER, JR., *Secretary.*

Countersigned this — day of ——.

GEO. WATKINS,
*Transfer Agent.*

Countersigned and prior certificate cancelled this — day of ——, —.

FOURTH NATIONAL BANK OF NEW YORK, *Registrar,*
By CHAS. HATTLER, *Cr.*

Central Pacific Railroad Company.

*Dividend Warrant.*

No. 29.

The bearer is entitled to the twenty-ninth dividend on shares of the capital stock of this company represented by certificate No. D. Payable in the city of New York and elsewhere, as may be designated by said company.

E. H. MILLER, JR., *Sec'y.*

Warrants No. 29, 30, 31, 32, 33 & 34 attached.

For value received — hereby sell, assign and transfer unto —— —— — shares of the stock represented by the within certificate and do hereby irrevocably constitute and appoint —— —— attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.

—— ——.

Dated —— —, 18—..

In presence of

—— ——.

106 EXHIBIT "B."

STATE OF NEW YORK,
*Office of the Secretary of State.*

ALBANY, *Jan.* 15, 1903.

F. H. Remington, Esq., Milwaukee, Wis.

DEAR SIR: I have made diligent examination in this office for a statement under section 16 of the general corporation law and a designation by the Central Pacific Railroad Company of a person upon whom summons may be served in this State, pursuant to section 432 of the Code of Civil Procedure of said State, and upon such examination I find no such statement or designation by said corporation on file in this office.

Yours respectfully,

JOHN F. O'BRIEN,
*Secretary of State.*

107 STATE OF NEW YORK, SUPREME COURT, } ss:
*County of Jefferson,*

HIRAM REMINGTON, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } Affidavit.

STATE OF COLORADO, } ss:
*County of Pueblo,*

J. C. Stubbs, being duly sworn, deposes and says: I reside and have an office in the city of Chicago, State of Illinois, and am not a resident of the State of New York and was not on the date of the service of the summons herein on me. I have been a resident of the said city of Chicago since about July, 1901, and prior to that time was a citizen and resident of San Francisco, California, for many years. On the 10th day of April, 1903, a copy of a summons in the above entitled action was served upon me while I was in the city of New York for a few days upon business in no way connected with the business of the above named defendant. I was a director of the defendant, The Central Pacific Railroad Company, above named, at the time of the service of said summons but was not an officer thereof. The said company is a corporation organized under the laws of the State of California, and it does no business whatever in the State of New York and has no property within the said State. And I do further depose and say that I have no knowledge or information on the subject of any cause of action existing in favor of the plaintiff against the said defendant. If such a cause of action does exist I am unable to state where it arose, but as the
108 defendant has not, to my knowledge, done or transacted any business within the State of New York, I do not believe that if a cause of action exists in favor of the plaintiff against the said defendant, it arose within the said State of New York.

J. C. STUBBS.

Subscribed and sworn to before me this 2nd day of May, 1903.

MILES E. SAUNDERS,
*Notary Public.*

[NOTARIAL SEAL.]

Commission expires February 1st, 1905.

*Certificate of Magistracy.*

STATE OF COLORADO, } ss:
*County of Pueblo,*

I, W. T. Fairfax, county clerk and recorder in and for said county in the State aforesaid, do hereby certify that Miles G. Saunders,

whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and written thereon, was at the time of taking such proof of acknowledgment a notary public in and for said county of Pueblo, duly commissioned, sworn and acting as such, and duly authorized and qualified to take the acknowledgment of deeds, administration or oaths, etc., for lands, tenements and hereditaments in said State, and his commission and authority to act are recorded in my office, it being the only office in which such record is made. And further, that I am well acquainted with his handwriting and verily believe the signature to the said proof or acknowledgment is genuine, and that said instrument is executed and acknowledged according to the laws of the State of Colorado.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Pueblo, in said county this 2 day of May, A. D. 1903.

(Signed) W. T. FAIRFAX,
*County Clerk and Recorder,*

[SEAL.] By —— ——, *Deputy.*

109 Supreme Court, Jefferson County.

HIRAM REMINGTON
*vs.*
THE CENTRAL PACIFIC RAILWAY COMPANY.

Take notice that upon the summons herein and the affidavit of J. C. Stubbs, verified May 2nd, 1903, and a copy of which is hereto annexed and herewith served, a motion will be made at a special term of the supreme court, appointed to be held at the court house in the city of Utica, N. Y. on May 16th, 1903, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order setting aside the service of the summons herein, on the ground that such service was irregular, defective, null and void and of no effect, or for such other or further order as may be proper, with costs of motion.

Dated May 11, 1903.

Yours, etc., PURCELL, WALKER & BURNS,
*Attorneys for Defendant for Purposes of This Motion Only.*

15 Washington street, Watertown, N. Y.

To Messrs. Brown, Carlisle & Hugo, plaintiff's attorneys.

110 Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
THE CENTRAL PACIFIC RAILWAY COMPANY.

Please take notice that we appear in this action for the defendant for the purpose only of making a motion herein to set aside the service of the summons in this action on the defendant.

Dated May 11th, 1903.

Yours, etc., PURCELL, WALKER & BURNS,
*Attorneys for the Defendant for the Purposes Stated.*

15 Washington street, Watertown, N. Y.

To Messrs. Brown, Carlisle & Hugo, Watertown, N. Y.

111 STATE OF NEW YORK:

In Supreme Court, County of Jefferson.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of Jefferson.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*

Office & P. O. address, No. 8 Stone St., Watertown, N. Y.

Dated this 2nd day of April, 1903.

112 Supreme Court of the State of New York, County of Jefferson.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
*County of Jefferson,* } ss:

I, E. A. Chapman, clerk of said county of Jefferson, and also clerk of the supreme court for the said county, the same being a court of record, and also clerk of all the courts of record of said county, do hereby certify the above and foregoing to be full, true and correct copies of the record and the whole thereof in the above entitled suit or action heretofore pending in said supreme court wherein Hiram Remington is plaintiff and Central Pacific Railroad Company is defendant; said record consisting of the summons in said suit and the following affidavits:

J. C. Stubbs, verified May 2, 1903; George Watkins, verified June 24, 1903; Maxwell Evarts, verified June 26, 1903; Isaac E. Gates, verified June 24th, 1903; three affidavits of Frederick H. Remington, verified May 16, May 28, and July 2, 1903; two affidavits of the plaintiff, Hiram Remington, verified May 19, and July 6, 1903; Robert J. Cutting, verified July 7, 1903; two affidavits of Ellis H. Aldrich, verified May 15, and June 6, 1903; Augustus T. Gillender, verified June 26, 1903; George Watkins, verified July 2, 1903; Charles H. Patterson, verified July 2, 1903; certificate of the secretary of state, dated June 1, 1903; notice of motion to vacate service of summons, stipulation of attorneys for parties continuing the motion, order of special term, June 9, 1903, continuing motion, until July 11; stipulation signed by attorneys for the parties hereto, dated August 24, 1903, submitting motion, order of special term, dated Sept. 28, 1903, denying defendant's motion, all of which said papers were filed in my office October 2, 1903.

Also the following papers:

Notice of special appearance by defendant, dated May 11, 1903, notice of appeal by defendant from order denying motion to vacate service of summons filed Oct. 15, 1903, notice of motion by defendant, dated October 16, 1903, for stay, and affidavits of Thomas Burns, verified Oct. 16, 1903, and of Frederick Remington,
113 verified Oct. 19, 1903, and order of special term made Oct. 24, 1903, which latter notice of motion, affidavits and order were filed in my office Oct. 26, 1903; affidavits of Frederick H. Remington, verified Oct. 6, 1903; Hiram Remington, verified Oct. 16, 1903, and of John Carlisle, verified Oct. 17, 1903, and order of county judge, filed Oct. 19, 1903. Also the petition of the defendant for the removal of said suit to the United States circuit court, filed by said defendant on the 26th day of

October, 1903, and the bond on removal of said suit to the United States circuit court, filed by said defendant with said petition on the 26th day of October, 1903, all as appears on the files and of record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of Watertown in the said county of Jefferson and the State of New York, on this 4th day of November, one thousand nine hundred and three.

[SEAL.] E. A. CHAPMAN,
*Clerk of the County of Jefferson.*

Indorsed: Record on removal. Filed Nov. 4, 1903. W. S. Doolittle, clerk.

114 Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

Stipulated that the defendant may have twenty days' additional time in which to appear generally or specially herein, or for the purpose of moving to vacate the service of the summons in this action.

Dated April 22nd, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*

115 Supreme Court, Jefferson County.

HIRAM REMINGTON
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

The defendant may have ten days' time after the hearing and decision of the motion herein to appear generally in case the said motion be decided in favor of the plaintiff. This stipulation shall in no way affect any of plaintiff's rights on account of any prior appearance herein, or be deemed a waiver of any of plaintiff's rights herein.

Dated May 23d, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*

116 Supreme Court, Jefferson County.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF NEW YORK, *County of Jefferson,* } ss:

I, E. A. Chapman, county clerk of said county of Jefferson and clerk of the supreme court in said county, and all the courts of record of said county, do hereby certify the above and foregoing to be a full, true and correct copy of the supplemental record and of the whole thereof in the above entitled suit heretofore pending in said supreme court, wherein Hiram Remington is plaintiff and Central Pacific Railroad Company is defendant, said supplemental record consisting of two stipulations signed by Messrs. Brown, Carlisle & Hugo, attorneys for the plaintiff, and which was filed in my office on the 18th day of November, 1903, and as appears on the files and of record in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal of the county clerk of said county and clerk of said supreme court and courts of record, this 18th day of November, 1903.

[L. S.] E. A. CHAPMAN, *Clerk.*

116½ [Endorsed:] Law, No. 3441. United States circuit court, northern district of New York. Hiram Remington, plaintiff, vs. Central Pacific R. R. Company, defendant. Supplemental record on removal. Purcell, Walker & Burns, attorneys appearing specially for def't, 15 Washington street, Watertown, N. Y. Filed the 19th day of Nov., 1903, W. S. Doolittle, clerk.

117 United States Circuit Court, Northern District of New York.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

Upon reading and filing the annexed affidavit of J. C. Stubbs, verified the 30th day of October, 1903, and upon motion of Messrs. Purcell, Walker & Burns, attorneys for defendant, it is

Ordered that the plaintiff or his attorneys show cause before this court on the 10th day of November, 1903, at one o'clock p. m. on said day, or as soon thereafter as counsel can be heard, why the service of the summons in the above entitled suit should not be set aside; and it is further

Ordered that the time of the defendant to enter a general appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause.

Service of a copy of this order and the annexed affidavit upon the plaintiff or his attorneys on or before the 6th day of November, 1903 shall be sufficient.

Dated November 5, 1903.

GEO. W. RAY,
*U. S. Judge.*

118 United States Circuit Court, Northern District of New York.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

STATE OF ILLINOIS,
*County of Cook, City of Chicago,* } ss:

J. C. Stubbs being duly sworn deposes and says: I reside and have an office in the city of Chicago, State of Illinois, and am not a resident of the State of New York, and was not on the date of the service of the summons herein on me. I have been a resident of the said city of Chicago since July, 1901, and prior to that time was a citizen and resident of the city of San Francisco, in the State of California, for many years. On the 10th day of April, 1903, a copy of the summons in the above entitled suit was served upon me while I was in the city of New York for a few days upon business in no way connected with the business of the defendant above named. I was a director of The Central Pacific Railroad Company, the defendant above named at the time of the service of the said summons, but I was not an officer thereof. The said company is a corporation organized under the laws of the State of California, and at the time of the service of said summons upon me did no business whatever in the State of New York and had no property or office within said State. I further state that on the 29th day of July, 1899, the Central Pacific Railroad Company transferred all its property and franchises to The Central Pacific Railway Company, a corporation of the State of Utah, under the terms of what is known as the Central Pacific re-adjustment which was carried out in pursuance of the provisions of the act of Congress entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1898, and for prior years for other purposes" and approved July 7, 1898, and that since the said 29th day of
119 July, 1899 the said Central Pacific Railroad Company has done no business and has had no property of any kind whatever in the State of New York.

J. C. STUBBS.

Subscribed and sworn to before me this 30th day of October, 1903.

[SEAL.] JOSEPH A. KUCERA,
*Notary Public.*

STATE OF ILLINOIS, }
*Cook County,* } *ss:*

I, Peter B. Olsen, county clerk and clerk of the county court of Cook county, the same being a court of record, do hereby certify that Joseph A. Kucera whose name is subscribed to the annexed jurat, was, at the time of signing the same, a notary public in Cook county, duly commissioned, sworn and acting as such, and authorized to administer oaths and to take acknowledgments of deeds to be recorded in said State of Illinois; that I am well acquainted with the handwriting of said notary, and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at the city of Chicago, in the said county, this 30th day of Oct., 1903.

[SEAL.] PETER B. OLSEN, *Clerk.*

119½ [Endorsed:] Law. No. 3441. United States circuit court, northern district of New York. Hiram Remington, plaintiff, against Central Pacific Railroad Company, defendant. Affidavit of J. C. Stubbs and order to show cause. Purcell, Walker & Burns, attorneys for defendant, Watertown, New York. G. W. R., U. S. J. This motion granted. Motion of pl'ff to remand denied. G. W. R., U. S. J. Filed the 19th day of Jul-, 1904. W. S. Doolittle, clerk.

120 At a stated term of the circuit court of the United States, for the northern district of New York, held in the city of Utica, on the 23 day of July, 1904.

Present: Hon. George W. Ray, acting circuit judge.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. }

The defendant above-named having removed the above entitled action from the supreme court of the State of New York to this court, and a copy of the record having been entered in this court, and the plaintiff having applied to this court to have the action remanded to the said supreme court of the State of New York from whence it came; and said motion having come on to be heard at a stated term of this court;

Now upon reading and filing the notice of said motion to remand, dated November 10, 1903, the affidavit of Henry Purcell, verified November 24, 1903; the affidavit of John N. Carlisle, verified Decem-

ber 10, 1903; the affidavit of Willard E. Saxe, verified November 23, 1903; the affidavit of Francis M. Hugo, verified November 23, 1903, the copy of said record entered in this court on November 3, 1903, containing the summons, the special notice of appearance of the defendant for the purpose only of making a motion to set aside the service of the summons, the affidavit of J. C. Stubbs, verified May 2, 1903, the notice of motion to set aside the service of summons, the affidavit of Ellis H. Aldrich, verified May 15, 1903,
121 the affidavit of Frederick H. Remington, verified May 16, 1903, with exhibits annexed, the affidavit of Hiram Remington, verified May 19, 1903, the affidavit of Frederick H. Remington, verified May 28, 1903, the certificate of the secretary of state, dated June 1, 1903, the affidavit of Ellis H. Aldrich, verified June 6, 1903, the affidavit of Andrew Hunter, verified June 8, 1903, the stipulation of the parties hereto dated May 25, 1903, the order postponing the motion to set aside the service of the summons, dated June 9, 1903, the affidavit of Isaac E. Gates, verified June 24, 1903, with exhibits annexed, the affidavit of George Watkins, verified June 24, 1903, the affidavit of Maxwell Evarts, verified June 26, 1903, the affidavit of Augustus T. Gillender, verified June 26, 1903, the affidavits of Charles H. Patterson, George Watkins, and Frederick H. Remington, all verified July 2, 1903, the affidavit of Hiram Remington, verified July 6, 1903, the affidavit of Robert L. Cutting, verified July 7, 1903, with exhibits annexed, the stipulation of the parties hereto dated August 24, 1903, submitting motion to set aside the service of the summons to special term of the supreme court as of July 11, 1903, the order denying defendant's motion to set aside the service of the summons, entered September 28, 1903, notice of appeal from order denying the motion to set aside the service of the summons filed October 15, 1903; the affidavit of John N. Carlisle, verified October 17, 1903, the affidavit of Hiram Remington, verified October 16, 1903, the order of County Judge Emerson, dated October 19, 1903, for the examination of plaintiff, the affidavit of Thomas Burns, verified October 16, 1903, the notice of motion for stay pending appeal from the order denying the defendant's motion to set aside the service of the summons, the order of the special term of the supreme court of New York, dated October 24, 1903, staying proceedings in the said court, and relieving the defendant from default, the petition for removal, verified October 26, 1903, the bond on removal dated October 22, 1903, and the supplemental record filed herein, containing stipulations entered into in the supreme court of the State of New York between the parties herein; and after hearing James G. Flanders and
122 Frederick H. Remington of counsel for plaintiff in support of said motion to remand, and Maxwell Evarts, J. S. Sherman and Henry Purcell, of counsel for defendant in opposition to the said motion; and due consideration having been had, and the court having decided that the cause was properly removed to this

court, it is, upon motion of Purcell, Walker & Burns, solicitors and attorneys for the said defendant,

Ordered, that the said motion to remand be, and the same he reby is denied.

Enter

GEO. W. RAY,
*U. S. Judge.*

122½ [Endorsed:] At law 3441. Circuit court of the United States northern district of New York. Hiram Remington, plaintiff, *vs.* Central Pacific Railroad Company, defendant. Order denying motion to remand. Purcell, Walker & Burns, attorneys for defendant, Watertown, New York. Filed July 25/04. W. S. Doolittle, clerk.

123 At a stated term of the circuit court of the United States, for the northern district of New York, held in the city of Utica, on the 23 day of July, 1904.

Present: Hon. George W. Ray, acting circuit judge.

HIRAM REMINGTON, Plaintiff,
*against*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

This cause having been duly removed from the supreme court of the State of New York, Jefferson county, on the petition of the defendant appearing in said court specially for the purpose of such removal only, and a motion having been made herein by the defendant appearing specially in this court, and for the purpose of such motion only, to set aside the summons in this action, and the pretended service thereof on the defendant, and such motion having come on regularly to be heard at a stated term of this court:

Now upon reading and filing the order to show cause, granted herein on the 5th day of November, 1903, and the affidavit of J. C. Stubbs, verified October 30, 1903, and the affidavit of Maxwell Evarts, verified November 25, 1903, and upon a certified copy of the record filed in this court on the 4th day of November 1903, upon the removal of this action from the supreme court of the State of New York; and after hearing Maxwell Evarts, of counsel for defendant in support of said motion, and James G. Flanders, of counsel for plaintiff in opposition thereto, and the matter having been
124 fully considered, it is, on motion of Purcell, Walker & Burns, solicitors and attorneys for said defendant,

Ordered, that the aforesaid motion of the defendant arising upon the said order to show cause granted herein November 5, 1903, be, and the same hereby is in all respects granted; and that the summons in this action, and the pretended service thereof on the

defendant be, and the same hereby is in all respects set aside and declared to be null and void and of no effect.

Enter

GEO. W. RAY,
*U. S. Judge.*

124½ [Endorsed:] At law 3441. Circuit court of the United States northern district of New York. Hiram Remington, plaintiff, vs. Central Pacific Railroad Company, defendant. Order granting motion to set aside service of summons. Purcell, Walker & Burns, attorneys for defendant, Watertown, New York. Filed July 25, /04. W. S. Doolittle, clerk.

125 At a stated term of the circuit court of the United States for the northern district of New York, held in the city of Utica on the 23 day of August, 1904.

Present: Honorable George W. Ray, acting circuit judge.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } Judgment at Law.

The above-entitled cause having been commenced in the supreme court of the State of New York in and for Jefferson county, and removed to this court on the petition of the defendant; a copy of the record in said action in said State court, duly certified by the county clerk of said county under the seal of said State court, having been filed in this court on the 4th day of November, 1903; the plaintiff having duly made a motion in this court to remand said cause to said State court on the grounds that the defendant had waived and was estopped from asserting any right it may have had to remove said cause to this court by reason of certain proceedings taken by the defendant in said State court and specified in said motion; that the petition for the removal of said cause from said State court to this court was not filed at the time, or at any time before the defendant was required by the laws of said State or the rules of said State court in which said suit was brought to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter and too late to effect a removal of this suit to this court; that said petition for removal and the bond filed therewith were not presented to the said State court in session; and that this court is without jurisdiction to hear and determine the cause; and the defendant by an order to show cause having made a motion in this court to set aside the service of the summons in this
126 action on the defendant; and the plaintiff having duly objected to the hearing, consideration or decision by this court of said motion or order to show cause on the above grounds, and also on the ground that this court had no jurisdiction to hear, consider or decide said motion or order to show cause, or do anything in this

action except to remand the same to the State court; and the plaintiff having also urged upon the argument of the last-mentioned motion that the order made by said State court denying defendant's motion to set aside the said service of said summons on the defendant was an adjudication that was binding on this court and could not be reviewed by this court; and said two motions duly coming on for argument at the same time at a stated term of this court; and the court having heard the counsel for the parties on said motions, and, after duly considering the same, having denied the said motion to remand and granted the said motion to set aside the service of said summons, and orders to that effect having been signed and entered at this term of court; and the plaintiff having duly excepted to each of said two decisions and orders, which exceptions are allowed by the court:

Now on motion of Purcell, Walker & Burns, attorneys for the defendant,

It is hereby ordered and adjudged that this cause be and the same is hereby dismissed for want of jurisdiction of the defendant.

Enter.

By the court,

GEO. W. RAY, *Judge.*

126½ [Endorsed:] At law No. 3441. Circuit court of the United States northern district of New York. Hiram Remington, plaintiff, *vs.* Central Pacific Railroad Company, defendant. Judgment. Filed Aug. 30, 1904. W. S. Doolittle, clerk.

127 Circuit Court of the United States, Northern District of New York.

HIRAM REMINGTON, Plaintiff,
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } At Law.

*Bill of Exceptions.*

Be it remembered that the above entitled action was commenced in the supreme court of the State of New York in and for Jefferson county and was removed to this court upon a petition filed by the defendant. A copy of the record in the above entitled action, duly certified by the county clerk of Jefferson county, New York, by his certificate dated the 4th day of November, 1903 under his official seal, was filed in this court on the 4th day of November, 1903. The copy of said record filed in this court as aforesaid consists of copies of the following papers:

1. The petition of the above named defendant, verified October 26, 1903 and filed on the same day in the office of the county clerk of Jefferson county, New York, for the removal of this suit to the cir-

cuit court of the United States for the northern district of New York upon the ground that it is a suit of a civil nature in which there is a controversy between citizens of different States, and in which the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $2000. This petition has endorsed upon it the following: "Read on application Oct. 26, 1903, W. M. R., J. S. C."

2. A bond accompanying said petition for the removal of this suit to this court in the sum of five hundred dollars, executed by Fidelity & Deposit Company of Maryland as surety for the defendant. This bond is dated the 22nd day of October, 1903, and was filed in the office of said county clerk on the 26th day of October, 1903, and has endorsed upon it the following: "I hereby approve the within bond as to form and sufficiency of surety. Dated October 26, 1903, Watson M. Rogers, J. S. C."

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3. An order made by Hon. E. C. Emerson, county judge of Jefferson county, New York, dated the 19th day of October, 1903, for the examination of the plaintiff on the 2nd day of November, 1903 at ten o'clock in the forenoon of said day, pursuant to the provisions of article 1, title 3, chapter 9 of the Code of Civil Procedure, entered October 19, 1903.

4. An affidavit made by John N. Carlisle, one of the plaintiff's attorneys, used in procuring said order. This affidavit is dated the 17th day of October, 1903 and states that said action was commenced by the service of a summons upon J. C. Stubbs, a director of the defendant, on the 10th day of April, 1903; that the defendant has appeared specially by its attorneys and made a motion to set aside the service of the summons, which motion was denied, and that notice of appeal from the order denying said motion was served October 15, 1903. This affidavit was filed in said county clerk's office October 19, 1903.

5. The affidavit of Hiram Remington, the plaintiff, verified the 16th day of October, 1903 and filed in said county clerk's office on October 19, 1903. This affidavit was made for the purpose of procuring the said order for the plaintiff's examination, and states the facts and circumstances which make his testimony material and his examination necessary. This affidavit states that the plaintiff is eighty-seven years of age and states the various steps that had been taken in said action and as they elsewhere appear in this bill of exceptions; that the principal office of said defendant Central Pacific Railroad Company is kept by the defendant at No. 4 Montgomery street, in the Southern Pacific building, in the city of San Francisco, State of California; that the defendant Central Pacific Railroad Company also keeps an office at No. 120 Broadway in the city of New York, in the State of New York, which office is also occupied by the Southern Pacific Company, a Kentucky corporation, Central Pacific Railway Company, a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of Utah, and certain other corporations whose roads have been leased or are controlled by the said Southern Pacific

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Company. This affidavit contains the following: "That the complaint in said action has been prepared and verified by the plaintiff, but has not been served upon the defendant or its attorneys, for the reason that no demand for said complaint has been made by or in behalf of said defendant; that no answer has been served in said action; that the nature of said action and the substance of said plaintiff's cause of action are as follows: That this action is brought for the purpose of recovering damages from the defendant, Central Pacific Railroad Company, amounting to $414,492.64 and interest thereon from the 10th day of April, 1903, besides the costs and disbursements of this action, which damages arise out of the following facts." This affidavit then proceeds to allege the issuing of illegal and void certificates of capital stock by the defendant, the publication by the defendant in Poor's Manual in the city of New York of false and fraudulent representations concerning the financial condition of the defendant for the purpose of aiding in the sale of said illegal and void stock; the plaintiff's belief in and reliance upon the legality and validity of said stock so issued, and the purchase of a large quantity of such stock in the city of New York by the plaintiff, such purchase being induced by such representations and the said belief and reliance upon the truth of said representations and the validity of said stock. Said affidavit states the loss to the plaintiff by reason of the premises to be the sum of $188,925, and interest on various amounts from various dates, the said principal sum and interest constituting the amount of said damages, to-wit: the sum of $414,492.64. This affidavit also states the amount for which judgment is demanded, being the said sum of $414,492.64, interest and costs.

6. The affidavit of Frederick H. Remington, son of and counsel for the plaintiff, dated October 6, 1903 and filed in said county clerk's office October 19, 1903, made for the purpose of being used in obtaining the said order for the plaintiff's examination, stating certain facts relating to the evidence bearing upon the merits
130 of the case, and showing the necessity for the taking of the plaintiff's deposition to preserve evidence to be used upon the trial of the action.

7. A certified copy of the affidavit of Ellis L. Aldrich, dated the 6th day of June, 1903, used in obtaining said order for the plaintiff's examination, being the same affidavit hereinafter mentioned.

8. A certified copy of the affidavit of Ellis L. Aldrich, dated May 15, 1903, used for the purpose of obtaining said order for the taking of the plaintiff's examination, and being the same affidavit hereinafter mentioned.

9. A certified copy of the affidavit of Andrew Hunter, dated June 8, 1903, used for the purpose of obtaining said order for the plaintiff's examination and being the same affidavit hereinafter mentioned. Each of said three certified copies of affidavits was filed in said county clerk's office on the 19th day of October, 1903.

10. An order made at a special term of the supreme court of the

State of New York held at the court house in the city of Syracuse, New York, on the 24th day of October, 1903, present Hon. W. S. Andrews, justice presiding. This order was filed and entered in said county clerk's office on the 26th day of October, 1903, and, omitting the title, reads as follows:

"An order having been made in this action and entered in the office of the clerk of Jefferson county October 2nd, 1903, denying a motion duly made by the defendant to set aside the service of the summons herein, and the defendant having appealed from said order to the appellate division of this court:

Now, on reading and filing the affidavit of Thomas Burns, one of the attorneys for the defendant above named, appearing specially herein, which affidavit was verified October 16th, 1903, and the notice of motion for an order staying all proceedings on the part of the plaintiff and the affidavit of Frederick H. Remington, verified October 19, 1903; and after hearing Purcell, Walker & Burns, in support of said motion, and Brown, Carlisle & Hugo, attorneys
131 for the plaintiff, opposed,

It is ordered that the defendant be relieved from any default in appearing herein and that all proceedings on the part of the plaintiff be stayed pending said appeal and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein granted by Hon. E. C. Emerson, county judge of Jefferson county, and entered in said clerk's office October 19th, 1903.

Let the papers upon which this motion was made be filed and this order entered in Jefferson county.

Enter:

W. S. A., J. S. C.

Approved:
P., W. & B.
B., C. & H.

11. A notice of motion dated October 16, 1903 signed by the defendant's attorneys and addressed to the plaintiff's attorneys, notifying the plaintiff's attorneys that upon the affidavit of Thomas Burns thereto annexed, verified October 16, 1903, and upon all the papers heretofore served or filed and proceedings had in the said action, the defendant's attorneys would move the court at a special term to be held at the court house in the city of Syracuse, New York on the 24th day of October, 1903, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order staying all proceedings on the part of the plaintiff, respondent, under the order entered herein in the clerk's office of Jefferson county on the 2d day of October, 1903, until the decision of the appellate division of said court, fourth department, upon the appeal taken from said order by the defendant, appellant, or for such other relief as may be just.

12. An affidavit made by Thomas Burns, verified October 16,

1903, annexed to the foregoing notice entitled in this action, which affidavit, omitting the title, reads as follows:

"STATE OF NEW YORK,
*County of Jefferson, City of Watertown,* } ss:

Thomas Burns, being duly sworn, says, he is one of the at-
132 torneys for the defendant above named, who appears specially in this action by Purcell, Walker & Burns, attorneys and counselors of this court, residing at Watertown, N. Y.; that on the 2d day of October, 1903, an order was entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no complaint has been served or filed herein, as deponent is informed and believes.

That on October 15th, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the appellate division of this court, fourth department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this court for judgment herein; that no previous application for a like order has been made.

THOS. BURNS.

Sworn to before me this 16th day of October, 1903.

M. A. BURNS,
*Com'r of Deeds, City of Watertown.*"

The said affidavit of Thomas Burns and said notice were filed with said order made thereon, in the office of said county clerk on the 26th day of October, 1903.

13. The affidavit of Frederick H. Remington, verified October 19, 1903, made for the purpose of opposing said motion for a stay, and showing the necessity of taking plaintiff's testimony for use upon the trial of the action, and the serious consequences that might follow in case a stay should be granted preventing the taking of the plaintiff's deposition. This affidavit was filed with said order
133 in said county clerk's office on the 26th day of October, 1903.

14. A notice of appeal signed by the defendant's attorneys, addressed to the clerk of the county of Jefferson and to the plaintiff's attorneys. This notice is dated October 15, 1903 and was served and filed the same day, and gives notice that the defendant appeals to the appellate division of the supreme court, fourth department, from the order of the supreme court herein, granted at a

special term thereof on the 11th day of July, 1903, and entered in the clerk's office of the county of Jefferson on the 2d day of October, 1903, and from the whole of said order.

15. An order made at a special term of the supreme court held at the court house in the city of Syracuse, New York on the 11th day of July, 1903. Present, Hon. William S. Andrews, justice presiding. This order is dated September 28, 1903, and was filed and entered in said county clerk's office on the 2d day of October, 1903. After reciting the notice of motion herein made by the defendant to set aside the service of the summons herein on the defendant, and reciting the several affidavits and papers read and filed by the respective parties upon the hearing, the said order proceeds as follows: "and on reading and filing the stipulation signed by the attorneys for the parties hereto, dated August 24, 1903, submitting this motion to the above term of court, and after hearing Purcell, Walker & Burns, counsel for defendant in favor of said motion, and Brown, Carlisle & Hugo, counsel for plaintiff in opposition thereto,

"It is hereby ordered that said motion be and the same is hereby denied with ten dollars' costs to the plaintiff. Enter in Jefferson Co.

"Dated Sept. 28th, 1903.

"Enter:

W. S. A., J. S. C."

16. A stipulation dated August 24, 1903, signed by the plaintiff's attorneys and the defendant's attorneys, whereby it is stipulated that said motion made by the defendant for an order to set aside the service of the summons herein, and all papers in connection therewith, be submitted to Hon. William S. Andrews, justice
134 of the supreme court, as of the special term heretofore appointed to be held at the court house in the city of Syracuse, N. Y. on the 11th day of July, 1903, with the same force and effect as if said motion papers had been submitted at said special term.

17. The affidavit of Robert L. Cutting, the attorney for the plaintiff in an action brought by Walter Morshead on behalf of the stockholders of the Central Pacific Railroad Company, against Charles H. Tweed, Isaac E. Gates and Arabella Huntington, as executors of Collis P. Huntington, deceased, and the Central Pacific Railroad Company. It appears from this affidavit that Collis P. Huntington, deceased, was at the time of his death and for many years prior thereto, a resident of the city of New York, State of New York, and that said Charles H. Tweed, Isaac E. Gates and Arabella Huntington, executors of his last will and testament, and the defendants in said action as such executors, are residents of said city of New York. The complaint in said action brought by said Morshead is attached to said affidavit of Robert L. Cutting as an exhibit and made part of said affidavit. This affidavit tends to show that the defendant Central Pacific Railroad Company, had at the time of the commencement of this action, and still has a large claim against the

estate of said Collis P. Huntington, growing out of the relations of said Collis P. Huntington with the defendant Central Pacific Railroad Company as an officer and agent thereof. This affidavit of Robert L. Cutting was verified July 7, 1903, and was read by the plaintiff in opposition to said motion to set aside the service of said summons.

18. The affidavit of Maxwell Evarts, dated the 26th day of June, 1903. It appears from this affidavit that Maxwell Evarts is of counsel for the defendant in this action, and also counsel for the defendant Isaac E. Gates in the said action brought by Walter Morshead, and tends to show that the summons in said action brought by said Morshead was not properly served upon the Central Pacific Railroad Company, and tends to show that there are no merits in the said action brought by Walter Morshead, and that the defendant Central Pacific Railroad Company has no property in the State of New York. This affidavit of Maxwell Evarts was read by
135 the defendant in support of said motion to set aside the service of said summons.

19. An affidavit made by George Watkins, verified June 24, 1903, and read by the defendant in support of said motion to set aside the service of said summons. This affidavit states that affiant was transfer agent in the city of New York of the Central Pacific Railroad Company, and had charge of the transfer books of said company from the month of May 1882 to and including the month of July 1899, and that no stock was transferred upon the said books to the plaintiff, and that at no time did any stock stand in the plaintiff's name upon the books of said company.

20. The affidavit of Isaac E. Gates, verified the 24th day of June, 1903, read by the plaintiff in support of said motion to set aside the service of the summons. This affidavit tends to show that there is no merit in the said action brought by Walter Morshead, and that the defendant has no property in the State of New York. This affidavit has attached to it and made part of it as Exhibits "A" and "B," the complaint and the answer of said Isaac E. Gates as executor of Collis P. Huntington in said action brought by Walter Morshead.

21. An order made in this action at a special term of the supreme court held at the court house in the city of Watertown, N. Y. June 9, 1903. Present, Hon. M. L. Wright, justice presiding. This order, omitting the title, reads as follows:

"A motion having been made to set aside the service of the summons in the above entitled action, and now coming on for argument, and after hearing Henry Purcell, of counsel for the defendant, in support of said motion, and John N. Carlisle, Esq. of counsel for the plaintiff, in opposition thereto, and counsel for the defendant having asked that defendant be permitted to serve additional affidavits in support of said motion, it is

Ordered that the defendant may serve such additional affidavits

on the plaintiff's attorneys on or before July 1st, 1903, and
136 that "said motion be postponed and heard at special term, to be held by Mr. Justice Andrews at Syracuse, N. Y. July 11th, 1903.

Enter,

M. L. W., *J. S. C.*"

22. A stipulation signed by the plaintiff's attorneys and the defendant's attorneys, dated May 25, 1903, continuing the motion made in said action for the special term on May 16th, 1903 to the special term at the city of Watertown, N. Y. on June 9, 1903.

23. A certificate made at the office of the secretary of state, State of New York, and dated Albany, June 1, 1903, signed by Horace G. Tennant, second deputy secretary of state, under the official seal of said secretary of state, of which the following is a copy:

STATE OF NEW YORK, }
*Office of Secretary of State.* }

ALBANY, *June* 1, 1903.

"I hereby certify that I have made diligent examination in this office for a statement under section 16, of the general corporation law and a designation by the Central Pacific Railroad Company of a person upon whom summons may be served in this State pursuant to section 432 of the Code of Civil Procedure (the custody of such designation, if any there be, legally belonging to me), and that upon such examination I find no such statement or designation by said corporation on file in this office. I further certify that no certificate of authority authorizing said corporation to do business in this State has been issued.

Witness my hand and the seal of office of the secretary of state at the city of Albany, the day and year first above written.

HORACE G. TENNANT,
[SEAL.] *Second Deputy Secretary of State.*"

This certificate was read by the plaintiff in opposition to said motion to set aside the service of the summons.

137 24. The affidavit of Ellis L. Aldrich, verified the 15th day of May, 1903, and read by the plaintiff in opposition to said motion to set aside the service of the summons. This affidavit shows that on the 10th day of April, 1903 affiant personally served the summons in this action upon J. C. Stubbs, a director of the defendant at 120 Broadway in the borough of Manhattan, city of New York, N. Y., by personally delivering to and leaving with the said J. C. Stubbs a true copy of said summons; that the defendant is a foreign corporation; that affiant has used due diligence to obtain service of said summons upon an officer of the defendant within the State of New York, but that no president, treasurer or secretary or officers performing corresponding functions under another name

could be found by affiant within the State of New York. This affidavit also contains the following: "That deponent has also called at the office of the Southern Pacific Railroad Company in the borough of Manhattan, city of New York, and was there informed that it was also the office of the defendant Central Pacific Railroad Company; that deponent was further informed at the said office that none of the officers of the defendant Central Pacific Railroad Company resided or had his place of business in the State of New York, but that all the officers of said Central Pacific Railroad Company resided and had their places of business in the western part of the United States without the State of New York on the 10th day of April, when the said service was made.

25. An affidavit made by Ellis L. Aldrich, verified the 6th day of June, 1903, and used by the plaintiff in opposition to said motion to set aside the service of said summons. This affidavit states more particularly than the last preceding affidavit made by said Aldrich the manner in which he served the said summons and the efforts that he made to ascertain the whereabouts of the officers of the defendant. This affidavit shows the service of the summons on the said J. C. Stubbs as such director on the 10th day of April, 1903 at 120 Broadway in the borough of Manhattan, city of New
138 York, and says, that at the time deponent served the said summons as aforesaid he knew the said Central Pacific Railroad Company to be the same person mentioned and described in the said summons as defendant therein. This affidavit contains the following: "That subsequently on the 13th day of May, 1903, deponent called at the office of the Central Pacific Railroad Company at 120 Broadway, borough of Manhattan, city of New York, and was there told by a person in the said office that all of the officers of the Central Pacific Railroad Company, on the 10th day of April, 1903, resided and had their places of business in the western part of the United States, without the State of New York, and that there were on the said 10th day of April, 1903, no persons within the State of New York performing corresponding functions to the president, treasurer or secretary of the said Central Pacific Railroad Company under another name."

26. The affidavit of Andrew Hunter, verified June 8, 1903, used by the plaintiff in opposition to said motion to set aside the service of the summons. This affidavit states that on the 6th day of April, 1903 affiant was employed by Aldrich & Vandewalker to make service of the summons in the above entitled action upon the defendant herein; that he proceeded on that day with said summons in his possession to the office of the Southern Pacific Railroad Company at 120 Broadway, Manhattan, New York city, which said office was also the office of the Central Pacific railroad in New York, and made inquiries in said office for J. C. Wilcutt, the secretary, and N. T. Smith, the treasurer of said Central Pacific Railroad Company, but that deponent was there informed that neither said Wilcutt nor said Smith were in New York, but that they resided and had their

places of business in the city of San Francisco, in the State of California; that neither of them was expected to come to New York, and that they very seldom came East from San Francisco.

27. The affidavit of Augustus T. Gillender, verified June 26, 1903, read by the plaintiff in opposition to said motion to set aside the service of the summons. This affidavit identifies a certificate of capital stock issued by the defendant, and a copy of the said certificate is attached to said affidavit and made a part thereof.

139 This certificate shows that it was issued on the 15th day of July, 1890; that it is transferable only on the books of the defendant in the city of New York. It is signed by the 3d vice-president and the secretary of the company, and is countersigned on the 16th day of July, 1890 by George Watkins, transfer agent, and the Fourth National Bank of New York, registrar. It appears from the dividend warrant attached to the certificate that the dividends which may be declared by the company are payable in the city of New York or elsewhere as may be designated by the company.

28. The affidavit of George Watkins, verified the 2d day of July, 1903, read by the plaintiff in opposition to the motion to set aside the service of the summons. This affidavit states that affiant was transfer agent of the defendant in the city of New York, State of New York, from about May, 1882 to about 1897, and that the office of the defendant was during that period in the Mills building, Broad street, in said city, and that said office was the general financial office of said company in New York city. That said company kept in said office the necessary books for the transfer of its stock, and that deponent had charge of said books. That deponent, acting as such transfer agent, would receive certificates of stock of said company, properly endorsed and assigned, would note the transfer of said certificate on the transfer register, and would thereupon give to the person surrendering said certificate a new certificate, and that said new certificates were registered by the Fourth National Bank of the City of New York, which acted as registrar for the defendant during said period, and were also countersigned by deponent as such transfer agent.

29. The affidavit of Charles H. Patterson, cashier of the Fourth National Bank of the City of New York, verified the 2d day of July, 1903, and read by the plaintiff in opposition to said motion to set aside the service of the summons. This affidavit shows that from the year 1882 to about the year 1897, the Fourth National Bank of the City of New York acted as the registrar of the capital stock of the defendant, and that during the same time the defend-

140 ant maintained an office in the city of New York.

30. The affidavit of Frederick H. Remington, verified the 2d day of July, 1903, and read by the plaintiff in opposition to said motion to set aside the service of the summons. This affidavit states that affiant is counsel for the plaintiff in this action, and states the false and fraudulent representations claimed by the plaintiff to have

been made by the defendant and caused to be published in Poor's Manual in the city of New York, and also states some of the evidence by which the plaintiff expects to prove that said false and fraudulent representations were published in the city of New York at the instance of the defendant. This affidavit also states the efforts made by affiant to find an officer of the defendant in the State of New York upon whom to serve the summons in this action.

31. Another affidavit made by Frederick H. Remington, verified the 28th day of May, 1903, and read by the plaintiff in opposition to said motion to set aside the service of the summons. This affidavit states the efforts made by affiant to find an officer of the defendant upon whom to serve the summons in this action; states what he has learned concerning the said action brought by Walter Morshead; that the said Collis P. Huntington, deceased, was a resident of the city of New York, State of New York, at the time of his death, and his executors, who were parties defendant in said action brought by said Morshead, are residents of the State of New York, and that it appears from the complaint in said action brought by Walter Morshead that the said action was brought to compel the said executors to account for a large amount of profits alleged to have been made by their said decedent Collis P. Huntington, while acting as vice-president, director and financial agent of the said Central Pacific Railroad Company, and which are alleged in said complaint to belong to said company, and to compel the said executors to pay the said profits, with interest thereon, to the said Central Pacific Railroad Company for the benefit of its stockholders.

32. An affidavit made by Hiram Remington, the plaintiff,
141 verified the 6th day of July, 1903, and read by the plaintiff in opposition to the motion to set aside the service of the summons. This affidavit states the manner in which the capital stock of the defendant was transferred to the plaintiff, and shows that certificates for such stock were assigned to the plaintiff in blank and was purchased by him in the open stock market in the city of New York, and that said certificates, upon such purchase, were held by him with the said blank assignments thereof, but were not transferred by him upon the books of the defendant, and the said certificates were transferred by him, with said blank assignments thereon, when he sold the same; that he surrendered to the defendant certain dividend warrants attached to said certificates of stock for dividends which were declared upon the same while he held such stock; that affiant did not discover the facts constituting the frauds alleged by him, or any of them, until long after the sale and transfer of said stock and certificates by him, and not till in or about the month of December, 1902. The affidavit then states that the plaintiff relied upon the representations caused to be published by the defendant in said Poor's Manual relating to the financial condition of the defendant, in purchasing the said stock, and relied upon all the stock of the defendant corporation having been fully paid and duly and

legally issued, in purchasing said stock, and did not discover that the article referred to published in Poor's Manual did not state the truth until in or about the month of December, 1902; that the plaintiff has been at the several times mentioned in the affidavit, and still is, a resident of Jefferson county, State of New York. This affidavit contains the following: "That the plaintiff expects to be able to prove upon the trial of this action the purchases and sale of said stock as aforesaid, the frauds of the defendant, that the plaintiff was damaged thereby, and all the facts constituting a good cause of action in favor of the plaintiff and against the defendant."

33. Another affidavit made by the plaintiff, Hiram Remington, verified the 19th day of May, 1903, and read in opposition to
142 said motion to set aside the service of the summons, in which he states that the cause of action for which this action has been commenced arose in the State of New York; that said action is brought to recover damages arising and resulting from the purchase by the plaintiff of certain shares of the capital stock in the defendant corporation; that affiant purchased the said stock in the city of New York, State of New York, and paid for it in said city, and the said certificates of stock were transferred to him in said city.

34. An affidavit made by Frederick H. Remington, verified the 16th day of May, 1903, and read in opposition to said motion to set aside the service of the summons, stating that he is a son of the plaintiff and an attorney and counsellor at law, and of counsel for the plaintiff in this action; that the defendant had an office for the transaction of business of said corporation in the city of New York, State of New York, until in or about the year 1900, and that during part of said time the office of said company in the city of New York was at # 23 Broad street, in said city, as anyone may ascertain from directories of New York city or from Poor's Manual for 1899 and prior years; that the cause of action for which the above entitled action is brought arose in the State of New York during the period the defendant maintained an office in said city of New York as aforesaid; that the action was brought for the purpose of recovering damages from the defendant for issuing illegal and void certificates of the capital stock of said Central Pacific Railroad Company, and for making and causing to be published false and fraudulent representations concerning the capital stock represented by said certificates, and concerning the affairs and condition of said Central Pacific Railroad Company, and concerning the consideration paid to said company for said stock for the purpose of giving said capital stock represented by said certificates a fictitious value upon the market, and for the purpose of inducing the public to purchase said stock represented by said certificates, and alleging that the said stock was issued by the defendant in the State of New York,
143 and stating that said false and fraudulent representations were made and published by the defendant in the State of New York. This affidavit states in considerable detail the facts

claimed by the plaintiff to constitute a cause of action against the defendant. The affidavit further says: "The plaintiff lost a large amount of money by reason of having purchased the said fraudulent and void certificates of stock as aforesaid, and was damaged in the amount of said loss by reason of the facts herein set forth, and which will be more fully set forth in the complaint in this action."

35. An affidavit made by J. C. Stubbs, verified the 2d day of May, 1903, upon which the defendant made the motion in the State court to set aside the service of the summons in this action. This affidavit, omitting the title, reads as follows:

"STATE OF COLORADO, } ss:
*County of Pueblo,* }

J. C. Stubbs, being duly sworn, deposes and says: I reside and have an office in the city of Chicago, State of Illinois, and am not a resident of the State of New York and was not on the date of the service of the summons herein on me. I have been a resident of the said city of Chicago since about July, 1901, and prior to that time was a citizen and resident of San Francisco, California, for many years. On the 10th day of April, 1903, a copy of a summons in the above entitled action was served upon me while I was in the city of New York for a few days upon business in no way connected with the business of the above named defendant. I was a director of the defendant, The Central Pacific Railroad Company, above named, at the time of the service of said summons but was not an officer thereof. The said company is a corporation organized under the laws of the State of California, and it does no business whatever in the State of New York and has no property within the said State. And I do further depose and say that I have no knowledge or information on the subject of any cause of action existing in favor of the plaintiff against the said defendant. If such a cause of action does
144 exist I am unable to state where it arose, but as the defendant has not, to my knowledge, done or transacted any business within the State of New York, I do not believe that if a cause of action exists in favor of the plaintiff against the said defendant, it arose within the said State of New York.

J. C. STUBBS.

Subscribed and sworn to before me this 2d day of May, 1903.
MILES E. SAUNDERS,
[NOTARIAL SEAL.] *Notary Public.*
Commission expires February 1st, 1905."

36. A notice in this action served upon the plaintiff's attorneys on the 11th day of May, 1903, of which the following is a copy, omitting the title:

"Take notice that upon the summons herein and the affidavit of J. C. Stubbs, verified May 2nd, 1903, a copy of which is hereto an-

nexed and herewith served, a motion will be made at a special term of the supreme court, appointed to be held at the court house in the city of Utica, N. Y., on May 16th, 1903, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order setting aside the service of the summons herein, on the ground that such service was irregular, defective, null and void and of no effect; or for such other or further order as may be proper, with costs of motion.

Dated May 11th, 1903.

Yours, etc.,

PURCELL, WALKER & BURNS,
*Attorneys for Defendant for Purposes of This Motion Only,*
15 *Washington Street, Watertown, N. Y.*

To Messrs. Brown, Carlisle & Hugo, plaintiff's attorneys."

37. A notice of special appearance for making a motion in this action to set aside the service of the summons on the defendant, addressed to the plaintiff's attorneys and signed by the de-
145 fendant's attorneys, and dated May 11, 1903.

38. The summons in this action which, omitting the title, reads as follows:

"To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of Jefferson.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*

Office & P. O. address, No. 8 Stone St., Watertown, N. Y.

Dated this 2nd day of April, 1903."

All of said papers used on said motion to set aside the service of the summons were filed in said clerk's office October 2, 1903.

The various affidavits, orders, stipulations and papers hereinbefore enumerated having been certified to this court from the supreme court of the State of New York in and for Jefferson county, by E. A. Chapman, county clerk of said Jefferson county, and clerk of said supreme court for said county, by his certificate under his official seal, dated the 4th day of November, 1903, which said certificate states that the said copies of said affidavits, orders, stipulations and other pa— are true and correct copies of the record and the whole thereof in said suit or action, and enumerates said papers in said certificate, and said certificate and said copies of said papers an-

nexed thereto having been filed in the office of the clerk of this court on the 4th day of November, 1903, and the said certificate and the said copies of said papers having thereupon become a part of the record in this court, the said certificate, and all of said affidavits, orders, stipulations and other papers enumerated in said certificate and hereinbefore enumerated, are hereby referred to and made a part of this bill of exceptions as if fully set forth in this bill of exceptions at large.

146 Thereafter and on the *19th* day of November, 1903 there was filed in this court a copy of a supplemental record from said State court, duly certified by said county clerk of Jefferson county, containing copies of two stipulations in this action, in said State court, procured by the defendant's attorneys from the plaintiff's attorneys, and which were filed after said first record was transmitted to this court. The first of said stipulations, omitting the title, reads as follows:

"Stipulated that the defendant may have twenty days' additional time in which to appear generally or specially herein, or for the purpose of moving to vacate the service of the summons herein.

April 22nd, 1903.

BROWN, CARLISLE & HUGO,
*Att'ys for Pl'ff.*"

The second of said stipulations, omitting the title, reads as follows:

"The defendants may have ten days' time after the hearing and decision of the motion herein, to appear generally, in case the said motion be decided in favor of the plaintiff. This stipulation shall in no way affect any of the plaintiff's rights on account of any prior appearance herein, or be deemed a waiver of any of plaintiff's rights herein.

Dated May 23d, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*"

On the 5th day of November, 1903, the defendant in this action procured an order in said action in this court of which the following, omitting the title, is a copy:

"Upon reading and filing the annexed affidavit of J. C. Stubbs, verified the 30th day of October, 1903, and upon motion of Messrs. Purcell, Walker & Burns, attorneys for defendant, it is

Ordered that the plaintiff or his attorneys show cause before this court on the 10th day of November, 1903, at one o'clock p. m. on said day, or as soon thereafter as counsel can be heard, why the service of the summons in the above entitled suit should not

147 be set aside; and it is further

Ordered that the time of the defendant to enter a general

appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause.

Service of a copy of this order and the annexed affidavit upon the plaintiff or his attorneys on or before the 6th day of November 1903, shall be sufficient.

Dated, November 5, 1903.

GEO. W. RAY,
*U. S. Judge.*"

This order was made upon an affidavit of J. C. Stubbs, verified October 30, 1903, of which the following, omitting the title, is a copy:

"STATE OF ILLINOIS,
*County of Cook, City of Chicago,* } ss:

J. C. Stubbs, being duly sworn deposes and says: I reside and have an office in the city of Chicago, State of Illinois, and am not a resident of the State of New York, and was not on the date of the service of the summons herein on me. I have been a resident of the said city of Chicago since July, 1901 and prior to that time was a citizen and resident of the city of San Francisco, in the State of California, for many years. On the 10th day of April, 1903, a copy of the summons in the above entitled suit was served upon me while I was in the city of New York for a few days upon business in no way connected with the business of the defendant above named. I was a director of The Central Pacific Railroad Company, the defendant above named, at the time of the service of the said summons, but I was not an officer thereof. The said company is a corporation organized under the laws of the State of California, and at the time of the service of said summons upon me did no business whatever in the State of New York and had no property or office within said State. I further state that on the 29th day of July, 1899 the Central Pacific Railroad Company transferred all its property and
148 franchises to the Central Pacific Railway Company, a corporation of the State of Utah, under the terms of what is known as the Central Pacific re-adjustment which was carried out in pursuance of the provisions of the act of Congress entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1898, and for prior years for other purposes," and approved July 7, 1898, and that since the said 29th day of July, 1899 the said Central Pacific Railroad Company has done no business and has had no property of any kind whatever in the State of New York.

J. C. STUBBS.

Subscribed and sworn to before me this 30th day of October, 1903.

[SEAL.] JOSEPH A. KUCERA,
*Notary Public.*"

A certificate concerning the official character of the notary before whom said affidavit was verified is attached to said affidavit.

The foregoing order to show cause and affidavit were served upon the plaintiff's attorneys on the 6th day of November, 1903.

On the 10th day of November, 1903, and before said order to show cause came on for hearing, the plaintiff's attorneys filed in this court a written motion in this action, of which the following is a copy, omitting the title, to-wit:

"Now comes the above named plaintiff and moves this court to remand the above entitled cause to the supreme court of the State of New York in and for Jefferson county, on the ground that this court is without jurisdiction to hear and determine the cause.

Dated November 9th, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys, 8 Stone St., Watertown, N. Y.*

149 JAMES G. FLANDERS,
FREDERICK H. REMINGTON,
*Of Counsel.*"

That thereafter, and on the 13th day of June, 1904, the plaintiff's attorneys served upon the defendant's attorneys a notice in this action signed by them and addressed to the defendant's attorneys, dated June 11, 1904, entitled in this action and amending the said motion to remand by particularly specifying the grounds of said motion as follows:

"1. The defendant waived and is estopped from asserting any right it may have had to remove said cause from the said State court to the circuit court of the United States in and for the northern district of New York by reason of the fact that the defendant procured an order from said State court in said action on the 24th day of October, 1903, and caused the same to be entered in the office of the clerk of said State court on the 26th day of October, 1903, which order stayed all proceedings on the part of the plaintiff in said action pending the appeal which had been taken by the defendant to the appellate division of the supreme court, fourth department, in the State of New York, from an order made in said action by the supreme court of the State of New York and entered on the 2nd day of October, 1903, denying a motion made by said defendant to set aside the service of the summons in said action and until ten days after the decision of said appeal, "except that this order shall not stay the order for the examination of the plaintiff herein granted by Hon. E. C. Emerson, county judge of Jefferson county, and entered in said clerk's office October 19, 1903," which said order procured by the defendant, dated October 24, 1903, was made upon an affidavit of Thomas Burns, one of the defendant's attorneys in said action, made
150 on the 16th day of October, 1903, which contained the following: "That on the 2nd day of October, 1903, an order was

entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no complaint has been served or filed herein, as deponent is informed and believes. That on October 15th, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the appellate division of this court, fourth department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that said defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this court for judgment herein."

2. The petition for the removal of said cause from the supreme court of the State of New York to the circuit court of the United States in and for the northern district of New York was not filed at the time or any time before the defendant in said cause was required by the laws of said State, or the rules of said State court in which said suit was brought, to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter.

3. The said petition for removal and the bond filed therewith were not presented to the said State court.

4. The circuit court of the United States in and for the northern district of New York is without jurisdiction to hear and determine the cause."

That the last mentioned notice with proof of service thereof
151 on the defendant's attorneys on June 13th, 1904 was filed in this court on the 17th day of June, 1904, and said amended motion was duly presented to the court.

That each of said grounds mentioned in said amended motion was presented to this court by plaintiff's counsel on the argument of said motion to remand and in the briefs of the plaintiff's counsel and was discussed by defendant's counsel in their briefs and all of said briefs were submitted to the court upon the hearing of said motion to remand.

On the 10th day of November, 1903, and before said order to show cause why the service of said summons should not be set aside came on for hearing, the plaintiff's attorneys filed in this court written objections to the hearing, consideration or decision by this court of said motion or order to show cause, of which objections the following is a copy, omitting the title, to-wit:

"And now comes the plaintiff above named and objects to the hearing, consideration or decision by the above named court of the motion or order to show cause of the defendant, returnable before said court November 10th, 1903, at 1 o'clock p. m., why the service of the summons in said action should not be set aside, for the following reasons, to-wit:

1st. Because said defendant did not, as by law required, make and file a petition in said action in the State court for the removal of said suit into this court at or before the time the defendant was required by the laws of the State of New York or by the rules of the supreme court of New York to answer or plead to the complaint or declaration of the plaintiff.

2nd. Because this court has no jurisdiction to hear, consider or decide said motion or order to show cause or to do anything in said action except to remand the same to the State court.

3rd. Because no such bond as is required by law accompanied the said petition or was filed.

4th. Because the said petition for removal was and is
152 insufficient in law and according to the statute and practice.

Dated November 10th, 1903.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys, 8 Stone St., Watertown, N. Y.*

JAMES G. FLANDERS,
FREDERICK H. REMINGTON,
*Of Counsel.*"

That in addition to the said written objections raised to the hearing of said order to show cause, it was also urged upon the argument of said motion in this court to set aside the service of the summons by the plaintiff's counsel, and in the briefs of the plaintiff's counsel in opposition to said motion, that this court could not review and could not set aside the order made in the State court in said action dated the 28th day of September, 1903 and entered October 2, 1903, denying the defendant's motion to set aside the service of said summons and that said order was an adjudication that was binding on this court.

That in support of the said motion to remand this action to the supreme court of the State of New York in and for Jefferson county, the plaintiff read to this court and filed an affidavit made by Willard E. Saxe which, omitting the title, reads as follows:

"STATE OF NEW YORK, } ss:
*County of Jefferson,* }

Willard E. Saxe being duly sworn deposes and says that he is special deputy clerk of the county of Jefferson, State of New York, and special deputy clerk of the supreme and county courts in and for said county, and was such special deputy clerk during all the year 1903. That as such special deputy clerk he kept the minutes of the different courts in Jefferson county and attended all the holdings of said courts; that Mr. Justice Watson M. Rogers held a special term of the supreme court on the 3rd day of October, 1903, and said special term was then adjourned to October 10, 1903, at which time

it was adjourned without date. That said justice held no other
153 regular or special term in Jefferson county to the knowledge of deponent until the 7th day of November, 1903, and that on the 26th day of October, 1903, no term of the supreme court of the State of New York in and for the county of Jefferson was held within the county by Mr. Justice Rogers and said justice was not presiding at any term of court on the 26th day of October, 1903, but was at his chambers in the court house in the city of Watertown, Jefferson county on that date. That the petition and bond for removal of the above entitled cause to the circuit court of the United States, which was filed in the Jefferson county clerk's office on October 26th, 1903, signed by said justice on said date was presented to said justice at his chambers aforesaid and not while he was holding any term of the supreme court.

In addition to deposing to the foregoing facts, I, said Willard E. Saxe, do hereby certify to them as special deputy clerk of Jefferson county, State of New York.

In witness whereof I have hereunto set my hand and affixed the seal of said courts at the city of Watertown, N. Y. this 23rd day of November, 1903.

WILLARD E. SAXE,
*Special Dept. Clerk.*

Subscribed and sworn to before me this 23rd day of November, 1903.

WAYLAND F. FORD,
*Notary Public.*

[Jefferson County Seal.]"

Annexed to this affidavit was a certificate under the hand and seal of the county clerk of Jefferson county, authenticating the signature of the notary public before whom it was taken, and his authority. That in support of said motion to remand said cause to the State court, the plaintiff read to this court and filed an affidavit of Francis M. Hugo which, omitting the title, reads as follows:

"STATE OF NEW YORK, } ss:
*Jefferson County,* }

Francis M. Hugo, being duly sworn says he resides at the city of Watertown, N. Y. and is one of the attorneys for the plaintiff named in the above entitled action.

154 "Deponent further says that on the 23d day of November, 1903, he made an application to Hon. Watson M. Rogers, justice of the supreme court, and the justice who approved the petition and bond for removal of the above cause to the circuit court of the United States, for a certificate that said justice was not holding court at the time said petition and bond were approved on the 26th day of October, 1903, but was at his chambers. That said Mr.

Justice Rogers stated to deponent that he did not keep a record of the different terms of court held by him so that he could not tell him whether he was holding court on that day or not, but that Willard E. Saxe, special deputy clerk of Jefferson county kept the minutes of all the courts held by him and that said Saxe was the proper person to make application to for the purpose of determining whether there was a court on that day or not and that if said Saxe would make such a certificate it would correctly show the facts.

FRANCIS M. HUGO.

Sworn to before me this 23rd day of November, 1903.

JNO. CONBOY,
*Notary Public.*

[NOTARIAL SEAL.]"

In support *in* said motion to remand said action to said State court, the plaintiff read to this court and filed the affidavit of John N. Carlisle which, omitting the title, reads as follows:

"STATE OF NEW YORK, }
*Jefferson County,* } *ss:*

John N. Carlisle, being duly sworn, deposes and says that he is a member of the firm of Brown, Carlisle & Hugo, who are the attorneys for the plaintiff in the above entitled action; that he has in his possession a printed copy of the 'General Rules of Practice' adopted and established as provided by section 17 of the Code of Civil Procedure of the State of New York, which were in force and effect at and prior to the time of the commencement of this action, and which still continue in force and effect; that said printed
155 copy of said rules was issued by proper authority, and is entitled as follows: 'Supreme Court Rules—General Rules of Practice (adopted in convention of the justices of the supreme court assigned to the appellate division thereof held at Albany, December 4, 1895, pursuant to Code of Civil Procedure, sec. 17; amended October 24, 1899);' that the following is a copy of rule 24 of said printed rules, to-wit:

'Rule XXIV.

'Affidavit for order extending time.—No order extending a defendant's time to answer or demur shall be granted unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of merits, or proof that it was been filed, or an affidavit of the attorney or counsel retained to defend the action that from the statement of the case in the action made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof. The affi-

davit shall also state the cause of action and the relief demanded in the complaint, and whether any and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where any extension has been had, the date of issue shall be the same as though the answer had been served when the time to answer first expired.

'When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order.'

That the said rule 24 was in force at the commencement of this action, and has ever since been in force and effect; that said rule 24 was never complied with by the defendant in this action; that no affidavit or proof was ever presented, served or filed by the defendant in this action, as provided in said rule 24; that no notice of an application for an order for any extension of time to answer or demur was ever served by or in behalf of the defendant in said action; that no copy of any demurrer or of any answer in said action was ever served by or on behalf of the defendant therein; that the defendant's time to answer, demur or plead, or to demand a copy of the complaint in said action, has never been extended by a stipulation or order or otherwise; that the defendant's time to appear in said action has not been extended by stipulation, order or otherwise, except that on the 22d day of April, 1903, the plaintiff's attorneys gave the defendant's attorneys a stipulation giving the defendant
156 twenty days' additional time in which to appear, generally or specially, in said action, or for the purpose of moving to vacate the summons therein; and on the 23d day of May, 1903, the plaintiff's attorneys gave the defendant's attorneys a stipulation giving the defendant ten days' time after the hearing and decision of the defendant's motion to set aside the service of the summons to appear generally in case the said motion be decided in favor of the plaintiff; that this stipulation contained a provision that it should not be deemed a waiver of any of the plaintiff's rights; that the defendant in said action was in default and the plaintiff could have applied for judgment in said action between the 20th day of May and the 23d day of May, 1903; and the defendant again became in default in said action ten days after the decision of said motion in favor of the plaintiff on the 28th day of September, 1903, said ten days expiring on the 8th day of October, 1903; that from the said 8th day of October, 1903, until the filing of the petition and bond for the removal of this action to the circuit court of the United States for the northern district of New York on the 26th day of October, 1903, the defendant was in default in said action and the plaintiff could have applied to the court for judgment in said action, except that on the 24th day of October, 1903, the court granted a stay of proceedings which had the effect to prevent such application for judgment until ten days after the decision of the appeal taken

by the defendant in said action; that the defendant was in default at the time of filing the petition and bond for removal of said motion to this court.

JOHN N. CARLISLE.

Subscribed and sworn to before me this 10th day of December, 1903.

[NOTARIAL SEAL.] JNO. CONBOY,
*Notary Public, Jefferson County, New York.*"

That in support of said motion to remand this action to said State court the plaintiff also read to the court the copy of the record
157 in said action, containing the various affidavits, stipulations, orders and other papers hereinbefore mentioned, certified by the county clerk of Jefferson county and filed in this court on the 4th day of November, 1903, as hereinbefore stated.

That in opposition to said motion to remand said action to said State court the defendant's attorneys read and filed an affidavit of Henry Purcell which, omitting the title, reads as follows:

"STATE OF NEW YORK, }
*County of New York,* } *ss:*

Henry Purcell, being duly sworn, says, he is one of the attorneys for the defendant herein, having been retained on or about April 13th, 1903. That with his retainer, there was handed to him a summons, which it was stated had recently been served on one J. C. Stubbs, a director of the defendant while he was temporarily within this State. That on April 22d, 1903, deponent's firm obtained a stipulation from Brown, Carlisle & Hugo, plaintiff's attorneys, extending defendant's time twenty days additional in which to appear generally or specially herein. Thereafter and on or about the 11th day of May, 1903, deponent prepared and served motion papers on plaintiff's attorneys to vacate the service of the said summons, subscribing the same as appearing specially for that purpose. That by stipulation, dated May 14th, 1903, it was agreed that said motion might be brought on for argument on May 23rd, instead of May 16th, the time for which it was noticed. On May 23d, 1903, plaintiff's attorneys further extended the defendant's time to appear until ten days after the hearing and decision of the motion to vacate the service of the said summons. The hearing of said motion was further adjourned by stipulation until June 9th, and then until July 11th, before Mr. Justice Andrews of Syracuse.

Deponent further says, that on June 25th, he was suddenly taken ill, left his office, and on account of his illness did not return
158 to it and was not able to return to it until October 15th, 1903.

That on Sept. 28th, Justice Andrews denied defendant's motion to vacate the service of said summons and his order thereon

was entered in Jefferson county clerk's office Oct. 2nd, and a copy thereof with notice of such entry was on the day last mentioned served on deponent's said firm. That on Oct. 15th, defendant filed and served notice of appeal from the order denying the said motion and on that day, deponent discovered that the defendant was in default in appearing. That this was due entirely to deponent's illness. That on Oct. 16th defendant moved for stay of proceedings pending the appeal taken from the said order and upon said motion coming on on Oct. 24th, an order was made staying all proceedings on the part of the plaintiff, with the exception of the examination of the plaintiff before trial until ten days after the decision of the said appeal and relieving defendant from any default in appearing that then existed. This order was approved by the plaintiff's attorneys in writing upon the face thereof, was made on a Saturday at Syracuse, N. Y., and was entered in Jefferson county clerk's office Monday, Oct. 26th, 1903, which was as soon as it could be entered after it was made. That on the same day, Oct. 26th, deponent, on behalf of the defendant, presented its petition and bond for removal of this cause to the United States circuit court for the northern district of New York to Mr. Justice Rogers, a judge of the supreme court of this State, who received the said petition and approved of said bond and the same with said petition was thereupon filed in said clerk's office on the same day, to-wit: October 26, 1903.

Deponent further says that on or about October 19, 1903, the plaintiff applied *ex parte* upon the affidavits of the plaintiff, Hiram Remington, and others, to the county judge of Jefferson county for an order to examine the said plaintiff before trial which was granted on that day by said judge and thereafter and on October 23d, 1903, copies of said affidavits and order were served on deponent's
159 firm. That it was on the day last mentioned, to-wit: October 23, 1903, that it appeared for the first time from the papers or record in this action that the amount involved therein was two thousand dollars, exclusive of interest and costs, and this was shown and appears by a statement in the said last mentioned affidavit of Hiram Remington when he states in substance that the action was brought to recover $414,492.64.

That the case thereupon became a removable controversy and deponent as soon as possible thereafter made application for its removal. This deponent further states that he was advised informally on October 22, 1903, but not by the record herein, that the case would probably involve more than two thousand dollars and then out of abundant precaution obtained the bond on removal so as to be prepared to remove the action in case it became of record a removable one.

Deponent further says, that no complaint herein has been filed to his knowledge in the clerk's office of Jefferson county nor has any been served upon him or his firm.

And he further says, that on Nov. 4, 1903, a certified transcript of

the record of all the papers and proceedings herein, which has been filed in said Jefferson county clerk's office was duly made and certified by the clerk of said county and on the same day filed with the clerk of the United States circuit court for the northern district of New York, at Utica, N. Y., and that a supplemental record was filed with the said clerk on November 19th, 1903.

HENRY PURCELL.

Subscribed and sworn to before me this 24 day of November, 1903.

[SEAL.] CHARLES FRANKLIN,
*Notary Public, New York County.*"

160 That in support of said motion of the defendant to set aside the service of the summons the defendant's attorneys read and filed in this court an affidavit of Maxwell Evarts, verified the 25th day of November, 1903, of which the following, omitting the title, is a copy :

"STATE OF NEW YORK, COUNTY OF NEW YORK, } ss.:
*Southern District of New York,*

Maxwell Evarts being duly sworn deposes and says: I am counsel for the defendant in the above entitled action; and state of my own knowledge that the Central Pacific Railroad Company has done no business of any kind in the State of New York since July 29, 1899, and that since said date, it has had no office in the State of New York for the transaction of business and no property therein.

I further state that on July 29, 1899, the Central Pacific Railroad Company transferred to the Central Pacific Railway Company, all its property by an indenture and agreement, copy of which is annexed hereto and made a part hereof, marked Exhibit 'A;' and that such transfer was in pursuance of an agreement made between the United States of America, the Central Pacific Railroad Company, and Messrs. Speyer & Company, bankers of New York city, and dated February 1, 1899, a copy of which is also annexed hereto and made a part hereof marked Exhibit 'B.'

MAXWELL EVARTS.

Subscribed and sworn to before me this 25th day of November, 1903.

[SEAL.] CHARLES FRANKLIN,
*Notary Public, New York County.*"

Exhibit "A" attached to said affidavit of Maxwell Evarts is a deed and agreement made and entered into the 29th day of July, 1899, by and between the Central Pacific Railroad Company, party of the first part, and the Central Pacific Railway Company, party
161 of the second part, duly executed and acknowledged by said two companies, in and by which deed and agreement, and in

consideration of one dollar, and in consideration of the undertakings, covenants and agreements on behalf of the party of the second part therein contained, the party of the first part grants, bargains, sells, conveys, assigns, transfers and sets over unto the party of the second part all the properties, claims, demands, moneys, choses in action, lease-holds, rights, privileges and franchises owned by or belonging to the party of the first part, or to which it is in any wise entitled particularly describing them.

That Exhibit "B" attached to said affidavit of Maxwell Evarts is an agreement made and entered into the 1st day of February, 1899 by and between the United States of America, the Central Pacific Railroad Company and Messrs. Speyer & Company, bankers of the city of New York, settling the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads, and providing how the said indebtedness shall be secured and paid.

That in opposition to said motion made in this court to set aside the service of the summons, the plaintiff read the said copy of the record in said action certified from the State court, and the various papers therein contained.

That said motion to remand and said motion to set aside the service of said summons in said action came on for argument at the same time at a stated term of this court before Hon. George W. Ray, district judge presiding.

That thereafter and on the 23rd day of July, 1904 at a stated and the present term of this court, the court made an order denying the plaintiff's said motion to remand this cause to the supreme court of the State of New York in and for Jefferson county and at the same time made an order granting the defendant's said motion (arising on said order to show cause) to set aside the service of the summons and setting aside the said summons and the service thereof
162 and declaring the same to be null and void and of no effect; that said two orders were filed and entered on the 25th day of July, 1904; that said two orders are a part of the record in this action and are hereby referred to for a more particular description thereof; that thereafter during the same term of court at which said orders were made being the present term of court and on the 12th day of August, 1904 the plaintiff duly filed his exceptions, which are allowed by the court, and of which the following is a copy omitting the title, to-wit:

"Now comes the above named plaintiff, Hiram Remington, and

First. Excepts to the order of this court made the 23rd day of July, 1904, and entered the 25th day of July, 1904, denying the plaintiff's motion to remand this cause to the supreme court of the State of New York in and for Jefferson county.

Second. Said plaintiff excepts to the order of this court made the 23rd day of July, 1904, and entered the 25th day of July, 1904, granting the motion of the defendant arising upon the order to show cause granted herein November 5th, 1903.

Third. Said plaintiff excepts to the order of this court made the 23rd day of July, 1904, and entered the 25th day of July, 1904, setting aside the summons in this action and the service thereof on the defendant and declaring the same to be null and void and of no effect.

Dated August 9th, 1904.

BROWN, CARLISLE & HUGO,
*Plaintiff's Attorneys.*

JAMES G. FLANDERS,
FREDERICK H. REMINGTON,
*Of Counsel.*"

That thereafter, during the same term of court at which said last mentioned two orders were made and during the present term of court and on the 23rd day of August, 1904 this court rendered judgment in this action ordering and adjudging that this cause
163 be and the same is thereby dismissed for want of jurisdiction of the defendant, which judgment was entered on the 30th day of August, 1904, is a part of the record in this action and is hereby referred to for a more particular description thereof. That no opinion was written or filed in this cause.

And in order that said proceedings had may more certainly appear of record in this cause, I, George W. Ray, judge of said court before whom all said proceedings in this court were had, this day, during the same term of court at which said two orders were made by this court and entered and at which said judgment was rendered by this court and entered, do settle, allow, sign and certify the foregoing as and for the bill of exceptions in this cause and all therein contained is made manifest and part of the record in said cause, and I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the court is in issue in said case and is the only question arising in said case.

In witness whereof I have hereunto set my hand this 16th day of September, A. D. 1904.

GEO. W. RAY, *Judge.*

163½ [Endorsed:] At law, No. 3441. Circuit court of the United States, northern district of New York. Hiram Remington, plaintiff, *vs.* Central Pacific Railroad Company, defendant. Bill of exceptions. Brown, Carlisle & Hugo, plaintiff's attorneys, # 8 Stone street, Watertown, N. Y. Filed Sept. 20, 1904. W. S. Doolittle, clerk.

164 Circuit Court of the United States, Northern District of New York.

HIRAM REMINGTON, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.
} At Law. Petition for Writ of Error.

And now comes the above named plaintiff, Hiram Remington, by his attorneys, and says that this cause was commenced in the supreme court of the State of New York in and for Jefferson county; that the defendant filed in said State court a petition and bond for the removal of said cause to this court and a copy of the record in said cause in said State court certified by the clerk of said State court under the seal of said State court was filed in this court on the 4th day of November, 1903; that thereafter the plaintiff duly made a motion upon grounds stated therein for an order of this court remanding said cause to said State court, and the defendant obtained an order in this court requiring the plaintiff to show cause why the service of the summons in this action on the defendant should not be set aside; that thereafter and on the 23rd day of July, 1904, this court made an order in this cause denying plaintiff's said motion to remand said cause to said State court, and on the same day made another order granting the defendant's said motion to set aside the service of said summons on the defendant, and setting aside said summons and said service thereof and declaring the same to be null and void and of no effect; and each of said orders was entered July 25th, 1904; that the plaintiff duly excepted to each of said orders, which exceptions were allowed by the court; that thereafter, during the same term of court at which said two orders were made, and on the 23rd day of August, 1904, judgment was rendered by this court in this cause dismissing
165 the same for want of jurisdiction of the defendant, which judgment was entered on the 30th day of August, 1904; that in this cause the jurisdiction of the court was and is in issue; that the only question arising herein and the only question tried and decided by this court herein was the question of the jurisdiction of the court; that this court in and by said orders and judgment determined and decided in favor of the defendant and against the plaintiff in effect as follows, to wit: that said cause was properly removed from said State court to this court; that the defendant had not waived the right to remove said cause from said State court to this court by reason of the proceedings taken by it in said State court; that the defendant was not estopped from removing said cause from said State court to this court on account of proceedings taken by it in said State court; that the petition and bond for removal were not filed in said State court too late to effect such removal; that said petition and bond were filed in said State court at

the time or before the time the defendant was required by the laws of the State of New York or the rules of the supreme court of the State of New York, in which said suit was brought, to answer or plead to the declaration or complaint of the plaintiff; that it was not necessary to present said petition to said State court in session, but that it was sufficient to present said petition and bond to a justice of said State court at chambers; and that it was unnecessary to obtain any order from said State court or a judge thereof accepting said petition or removing said cause to this court; that the order made by said State court on September 28th, 1903, and entered October 2nd, 1903, denying defendant's motion to set aside the service of the summons on the defendant was not an adjudication that was binding on the defendant or on this court; that this court had power and jurisdiction to review said order of said State court denying the defendant's motion to set aside the service of the summons on the defendant and make an order granting defendant's motion to set aside the service of said summons on the defendant and setting the summons and said service aside and declaring the same to be null and void and of no effect notwithstanding
166 said order of said State court had not been reversed or set aside; that the service of said summons was not a legal and valid service of said summons on the defendant and said summons and said service thereof should be set aside and adjudged to be null and void and of no effect; that the defendant had not made a general appearance in the action and that the court had no jurisdiction of the defendant;

That the plaintiff is aggrieved by the said decisions of this court and by the judgment dismissing this action for want of jurisdiction of the defendant and by said order denying plaintiff's motion to remand this cause to said State court and by said order granting the defendant's motion to set aside the service of the summons on the defendant and setting aside said summons and the service thereof and declaring the same to be null and void and of no effect.

The plaintiff further says that in said order denying plaintiff's said motion to remand said suit to said State court and in said order granting the defendant's said motion to set aside the service of the summons in this action on the defendant and setting aside said summons and the service thereof on the defendant and declaring the same to be null and void and of no effect and in said judgment dismissing said action for want of jurisdiction of the defendant and in the proceedings prior thereto certain errors were committed on the question of the jurisdiction of the court to the prejudice and great damage of this plaintiff, all of which will more in detail appear in the record in this cause and from the assignment of errors which is presented and filed with this petition.

Wherefore, this plaintiff, considering himself aggrieved, prays that a writ of error may be allowed and may issue in this behalf to the Supreme Court of the United States to the end that said orders, rulings, decisions and judgment may be reviewed by the Supreme

Court of the United States upon the question of the jurisdiction of the court thereby determined, and that the errors so complained of may be corrected, and that a transcript of the record, proceedings
167 and papers in this cause duly authenticated may be sent to said Supreme Court of the United States.

Dated this 21st day of September, 1904.

BROWN, CARLISLE & HUGO,
*Attorneys for Plaintiff, # 8 Stone Street,*
*Watertown, New York.*

JAMES G. FLANDERS,
FREDERICK H. REMINGTON,
*Of Counsel.*

The foregoing petition for writ of error was duly presented to me this 14th day of November, 1904, before the allowance of the writ of error to the Supreme Court of the United States in said cause.

GEO. W. RAY,
*U. S. Judge.*

167½ [Endorsed:] At law. Circuit court of the United States, northern district of New York. Hiram Remington, plaintiff, vs. Central Pacific Railroad Company, defendant. Petition for writ of error. Brown, Carlisle & Hugo, attorneys for plaintiff, # 8 Stone street, Watertown, N. Y. Read Nov. 14, 1904 G. W. R., U. S. J. Filed Nov. 18 1904 W. S. Doolittle, clerk.

168 Circuit Court of the United States, Northern District of New York.

HIRAM REMINGTON, Plaintiff,
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.
} At Law. Assignment of Errors.

Now comes the above named plaintiff, Hiram Remington, by his counsel, and in connection with his petition for a writ of error to the Supreme Court of the United States assigns errors in the record and proceedings in the above entitled cause as follows:

1. The circuit court of the United States for the northern district of New York erred in making the order dated July 23, 1904, and entered July 25, 1904, denying plaintiff's motion to remand this action to the supreme court of the State of New York in and for Jefferson county.

2. Said circuit court erred in refusing to hold that the defendant waived any right it may have had to remove this suit from said State court to said circuit court by obtaining from said State court an order dated October 24, 1903, and entered October 26, 1903, stay-

ing all proceedings on the part of the plaintiff pending the appeal that had been taken by the defendant to the appellate division of said State court from an order made by said State court dated September 28, 1903, and entered October 2, 1903, denying a motion that had been made by the defendant in said State court to set aside the service of the summons in this action and until ten days after the decision of said appeal, except that the order which had been granted for the examination of the plaintiff on November 2, 1903, should not be stayed.

169 3. Said circuit court erred in refusing to hold that the defendant was estopped from removing this suit from said State court to said circuit court of the United States, by reason of the fact that it had obtained said order staying proceedings.

4. Said circuit court erred in refusing to hold that the defendant did not make and file a petition for the removal of this suit from the supreme court of the State of New York in and for Jefferson county to said circuit court at the time or at any time before the defendant was required by the laws of the State of New York, or the rules of the supreme court of the State of New York, in which such suit was brought, to answer or plead to the declaration or complaint of the plaintiff.

5. Said circuit court erred in refusing to hold that the petition and bond for removal were filed too late to effect a removal of said suit from said State court to the circuit court of the United States for the northern district of New York.

6. Said circuit court erred in refusing to hold that the defendant was in default at the time said petition and bond for removal were filed in said State court.

7. Said circuit court erred in refusing to hold that there was no controversy between the plaintiff and the defendant in this action at the time said petition and bond for removal were filed in said State court.

8. Said circuit court erred in refusing to hold that it was not sufficient to present said petition and bond to a judge of said State court at chambers.

9. Said circuit court erred in refusing to hold that said petition and bond for removal should have been presented to said State court in session.

10. Said circuit court erred in refusing to hold that the said petition and bond for removal, not having been presented to said
170 State court in session were insufficient to effect a removal of this suit to said circuit court of the United States.

11. Said circuit court erred in refusing to hold that because no order accepting said petition and bond or for the removal of said suit was made, this suit was not removed from said State court to said circuit court of the United States.

12. Said circuit court erred in granting the defendant's motion to set aside the service of the summons on the defendant in this action.

13. Said circuit court erred in making the order dated July 23rd, 1904, and entered July 25, 1904. that the summons in this action and the service thereof on the defendant be and is in all respects set aside and declared to be null and void and of no effect.

14. Said circuit court erred in rendering judgment in this action dismissing this action for want of jurisdiction of the defendant, which judgment was rendered on the 23rd day of August, 1904, and was entered on the 30th day of August, 1904.

15. Said circuit court erred in refusing to hold that the order of said State court, made in this action on September 28, 1903, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons in this action on the defendant was an adjudication that was binding upon the defendant and upon said circuit court of the United States.

16. Said circuit court erred in reviewing said order of said State court denying defendant's motion to set aside the service of the summons in this action on the defendant.

17. Said circuit court erred in refusing to hold that the defendant had made a general appearance in this action by obtaining from the plaintiff's attorneys on the 22nd day of April, 1903, a stipulation in writing in this action giving the defendant twenty days ad-
171 ditional time in which to appear generally or specially in said action or for the purpose of moving to vacate the service of summons in said action.

18. Said circuit court erred in refusing to hold that the defendant made a general appearance in this action by serving on the plaintiff's attorneys on the 11th day of May, 1903, a notice of motion to be heard in said State court on the 16th day of May, 1903, for an order setting aside the service of the summons in said action on the ground that such service was irregular, defective, null and void and of no effect, or for such other or further order as may be proper with costs of motion.

19. Said circuit court erred in refusing to hold that the defendant made a general appearance in this action by procuring from the plaintiff's attorneys on the 23rd day of May, 1903, a stipulation in writing in this action giving the defendant ten days' time after the hearing and decision of the plaintiff's motion to set aside the service of the summons in the action to appear generally, and providing the said stipulation should not in any way affect any of plaintiff's rights on account of any prior appearance in said action, or be deemed a waiver of any of plaintiff's rights in said action.

20. Said circuit court erred in refusing to hold that the defendant made a general appearance in said action by serving on the plaintiff's attorneys on the 16th day of October, 1903, a notice of motion, to be heard at a special term of said State court on the 24th day of October, 1903, for an order staying all proceedings on the part of the plaintiff, respondent, under the order entered in said action on the 2nd day of October, 1903, until the decision of the appellate division of said State court, fourth department, upon the appeal

taken from said order by the defendant, appellant, or for such other relief as may be just.

21. Said circuit court erred in refusing to hold that the defendant made a general appearance in said action by obtaining in said action, at a special term of said State court, on the 24th day
172 of October, 1903, the following order: "Ordered that the defendant be relieved from any default in appearing herein and that all proceedings on the part of the plaintiff be stayed pending said appeal (the appeal that had been taken by the defendant to the appellate division of said State court, fourth department, from the order denying defendant's motion to set aside the service of the summons in said action) and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein granted by Hon. E. C. Emerson, county judge of Jefferson county, and entered in the county clerk's office of said county October 19th, 1903" and by causing said order dated October 24, 1903, to be entered in the office of the county clerk of Jefferson county on the 26th day of October, 1903.

22. Said circuit court erred in refusing to hold that the defendant made a general appearance in this action by obtaining from a judge of said circuit court on November 5, 1903, after a copy of the record in this action was filed in said circuit court, an order to show cause which contained the following: "Ordered that the time of the defendant to enter a general appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause," and by serving said order on plaintiff's attorneys on November 6th, 1903, and by filing said order in the office of the clerk of said circuit court.

And the said plaintiff, Hiram Remington, prays that the orders and judgment aforesaid made and rendered by said circuit court of the United States may be reversed, annulled and altogether held for nought, and that this cause may be remanded to the supreme court of the State of New York in and for Jefferson county, and that the plaintiff may be restored to all things which he hath lost by occasion of said orders and judgment.

Dated September 21st, 1904.

BROWN, CARLISLE & HUGO,
*Attorneys for Plaintiff,*
8 *Stone Street, Watertown, New York.*
JAMES G. FLANDERS,
FREDERICK H. REMINGTON,
*Of Counsel for Plaintiff.*

173 The foregoing assignments of error were duly presented to me this 14 day of November, 1904, before the allowance of the writ of error to the Supreme Court of the United States in said cause.

GEO. W. RAY,
*U. S. District Judge.*

173½ [Endorsed:] Law 3441. Circuit court of the United States, northern district of New York. Hiram Remington, plaintiff, *vs.* Central Pacific Railroad Company, defendant. Assignment of errors. Brown, Carlisle & Hugo, plaintiff's attorneys, # 8 Stone street, Watertown, New York. G. W. R., U. S. J. Filed Nov. 18, 1904, W. S. Doolittle, clerk.

174 In Supreme Court of the United States.

HIRAM REMINGTON, Plaintiff in Error,
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant in Error.

Know all men by these presents that we, Hiram Remington, of the city of Watertown, New York, as principal, and Fred Waddingham and H. A. Nims, of the city of Watertown, Jefferson county, New York, as sureties, are held and firmly bound unto Central Pacific Railroad Company, its successors and assigns, in the sum of five hundred dollars ($500), to be paid to said Central Pacific Railroad Company, its successors and assigns; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated and executed this 10th day of September, A. D. 1904.

Whereas, the above named Hiram Remington, plaintiff in error, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the orders and judgment rendered in the above entitled action by the circuit court of the United States for the northern district of New York:

Now therefore, the condition of this obligation is such that if the above named Hiram Remington shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise
175 the same shall be and remain in full force and virtue.

HIRAM REMINGTON. [SEAL.]
FRED WADDINGHAM. [SEAL.]
H. A. NIMS. [SEAL.]

Signed, sealed & delivered in presence of
S. G. ADZIT.
JOHN H. COON.

UNITED STATES OF AMERICA,
*Northern District of New York, State of New York,* } *ss:*
*County of Jefferson,*

On this 10th day of September, A. D. 1904, personally appeared before me Fred Waddingham and H. A. Nims, who signed the

above and foregoing bond, and being each duly sworn doth each for himself depose and say that he is a resident of the city of Watertown, Jefferson county, in the State of New York, and is worth the sum of one thousand dollars over and above all his debts, and exclusive of property exempt from execution.

FRED WADDINGHAM.
H. A. NIMS.

Subscribed and sworn to before me this 10th day of September, A. D. 1904.

[NOTARIAL SEAL.] GEO. B. KEMP,
*Notary Public, Jefferson County, New York.*

I approve the foregoing bond as to form and sufficiency of sureties, and accept the same as good and sufficient security upon the writ of error in the foregoing entitled cause.

Dated November 15, 1904.

GEO. W. RAY, *U. S. Judge.*

175½ [Endorsed:] Law 3441. In Supreme Court of the United States Hiram Remington, plaintiff in error, *vs.* Central Pacific Railroad Company, defendant in error. Bond on writ of error. Brown, Carlisle & Hugo, plaintiff's attorneys, # 8 Stone street, Watertown, New York. Filed Nov. 18, 1904. W. S. Doolittle, clerk.

176 Circuit Court of the United States, Northern District of New York.

HIRAM REMINGTON, Plaintiff,
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.
} At Law. Order Allowing Writ of Error.

An order having been made by this court the 23rd day of July, 1904, denying the plaintiff's motion to remand this action to the supreme court of the State of New York in and for Jefferson county, and this court on the 23rd day of July, 1904, having made an order granting defendant's motion to set aside the service of the summons in said action on the defendant and setting aside said summons and the service thereof on the defendant, and declaring the same to be null and void and of no effect; said two orders having been entered on July 25th, 1904; and final judgment dismissing said action for want of jurisdiction of the defendant having been rendered by this court on the 23rd day of August, 1904, and entered on the 30th day of August, 1904; and the plaintiff on the 20th day of September, 1904, during the same term at which said orders and judgment were rendered and entered, having filed his bill of exceptions in said action; and the above named plaintiff, considering himself aggrieved

by the rulings of this court upon the question of the jurisdiction of the court in said action, having on this day during said term of court presented his assignment of errors and his petition praying for a writ of error from said judgment and orders to the Supreme Court of the United States to review said orders, judgment, rulings and decisions of this court upon said question of jurisdiction, and praying that said writ of error be allowed him to the said Supreme Court of the United States, and that a full transcript of the
177 record and proceedings in said cause duly authenticated be sent to said Supreme Court of the United States; and the jurisdiction of the court being in issue in this case; and the only question arising in said action and the only question tried and decided by this court therein being the question of the jurisdiction of the court; and a bond for said writ of error in the penalty of five hundred dollars having been duly executed and having been approved by the court:

Now, on reading and filing said petition, assignment of errors and bond, and during the same term of court at which said orders were made and entered and said judgment was rendered and entered; and on motion of Brown, Carlisle & Hugo, plaintiff's attorneys,

It is ordered and considered by the court that said writ of error to the Supreme Court of the United States, from said orders and said final judgment dismissing said suit for want of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiff, solely upon the question of the jurisdiction of the court as prayed for in said petition, to review the question of jurisdiction of the court in said petition mentioned, which is the only question arising herein.

Enter.

BY THE COURT.

Dated the 15 day of November, 1904.

GEO. W. RAY,
*U. S. Judge.*

177½ [Endorsed:] 3441 Circuit court of the United States, northern district of New York. Hiram Remington, plaintiff, vs. Central Pacific Railroad Company, defendant. Order allowing writ of error. Brown, Carlisle & Hugo, plaintiff's attorneys, 48 Stone street, Watertown, New York. Filed Nov. 18, 1904. W. S. Doolittle, clerk.

178 UNITED STATES OF AMERICA,
*Northern District of New York,* } ss:

I, William S. Doolittle, clerk of the circuit court of the United States of America, for the northern district of New York, by virtue of the writ of error hereto annexed and in obedience thereto, do hereby certify that I have compared the writings, annexed to this

certificate, to-wit: the record on removal, certified by the county clerk of Jefferson county, State of New York, the supplemental record on removal, certified by said county clerk, the order to show cause and the affidavit of J. C. Stubbs, thereto annexed, the order denying motion to remand, the order granting motion to set aside the service of the summons, the judgment, the bill of exceptions, the petition for writ of error, the assignment of errors, the bond on writ of error and the order allowing writ of error, with the originals now on file and of record in my office, and that the same are a true and correct copy of such originals and are a true and complete transcript of the record and all proceedings had in said court in the cause of Hiram Remington, plaintiff in error, against Central Pacific Railroad Company, defendant in error, with all things concerning the same, as the same remain of record and on file in said office.

I further certify that the original writ of error and the original citation issued in said cause, with proof of service thereof, are hereto annexed and are herewith returned, together with said transcript of the record, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Utica, in said district, this third day of December in the year of Lord one thousand nine hundred and four, and of the Independence of the United States, the one hundred and twenty-ninth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE, *Clerk*.

179 Supreme Court of the United States.

HIRAM REMINGTON, Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant in Error.

UNITED STATES OF AMERICA,
*Northern District of New York, Jefferson County,* } ss:

George S. McCartin, being first duly sworn on oath deposes and says that he is more than twenty-one years of age; that on the 23d day of November, A. D. 1904, he personally served the annexed citation, wherein Hiram Remington is named as plaintiff in error and Central Pacific Railroad Company is named as defendant in error, upon Purcell, Walker & Burns, who are the attorneys for Central Pacific Railroad Company, said defendant in error, by delivering to and leaving with Henry Purcell, a member of said firm of Purcell, Walker & Burns, a true copy of said citation, at the law office of Purcell, Walker & Burns in the city of Watertown, Jefferson county, State of New York, and that at the same time and place he personally served the writ of error mentioned in said citation, on said Purcell, Walker & Burns, attorneys for said defendant in error,

by delivering to and leaving with said Henry Purcell a certified copy of said writ of error, certified by the clerk of the circuit court of the United States for the northern district of New York, under the seal of said court, to be a correct transcript of said writ; and that at the time he served said papers as aforesaid he knew said Henry Purcell to be a member of said firm of Purcell, Walker &
180 Burns; that said Purcell, Walker & Burns are the same persons who were the attorneys and are mentioned as the attorneys, for said Central Pacific Railroad Company, the said defendant in error, in the record, proceedings and judgment in said citation and said writ of error mentioned, and they are still the attorneys for said Central Pacific Railroad Company in the action in which said judgment was rendered.

GEORGE S. McCARTIN.

Subscribed and sworn to before me this 23 day of November, 1904.

{Seal of Floyd L. Carlisle, Notary Public, Watertown, Jefferson Co., N. Y.}

FLOYD L. CARLISLE,
*Notary Public, Jefferson County, New York.*

STATE OF NEW YORK, }
*County of Jefferson,* } ss:

I, E. A. Chapman, clerk of the county of Jefferson, and clerk of the supreme and county courts, which are courts of record in and for said county do hereby certify: That Floyd L. Carlisle, Esq., whose name is subscribed to the certificate of proof or acknowledgement of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgement a notary public in and for said county, residing in the said county, duly authorized to take the same; that I am well acquainted with the handwriting of said notary public and verily believe that the signature to said certificate of proof or acknowledgement is genuine; and that said instrument is executed and acknowledged according to the laws of the State.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said county and courts thereof, at Watertown, N. Y., this 23d day of November 1904.

[Seal Jefferson County.]

E. A. CHAPMAN, *Clerk,*
By P. A. PILCHER,
*Deputy Clerk.*

181 UNITED STATES OF AMERICA, *ss*:

To the Central Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 15th day of December, 1904, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Hiram Remington is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in said writ of error mentioned should not be corrected, and why the errors in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

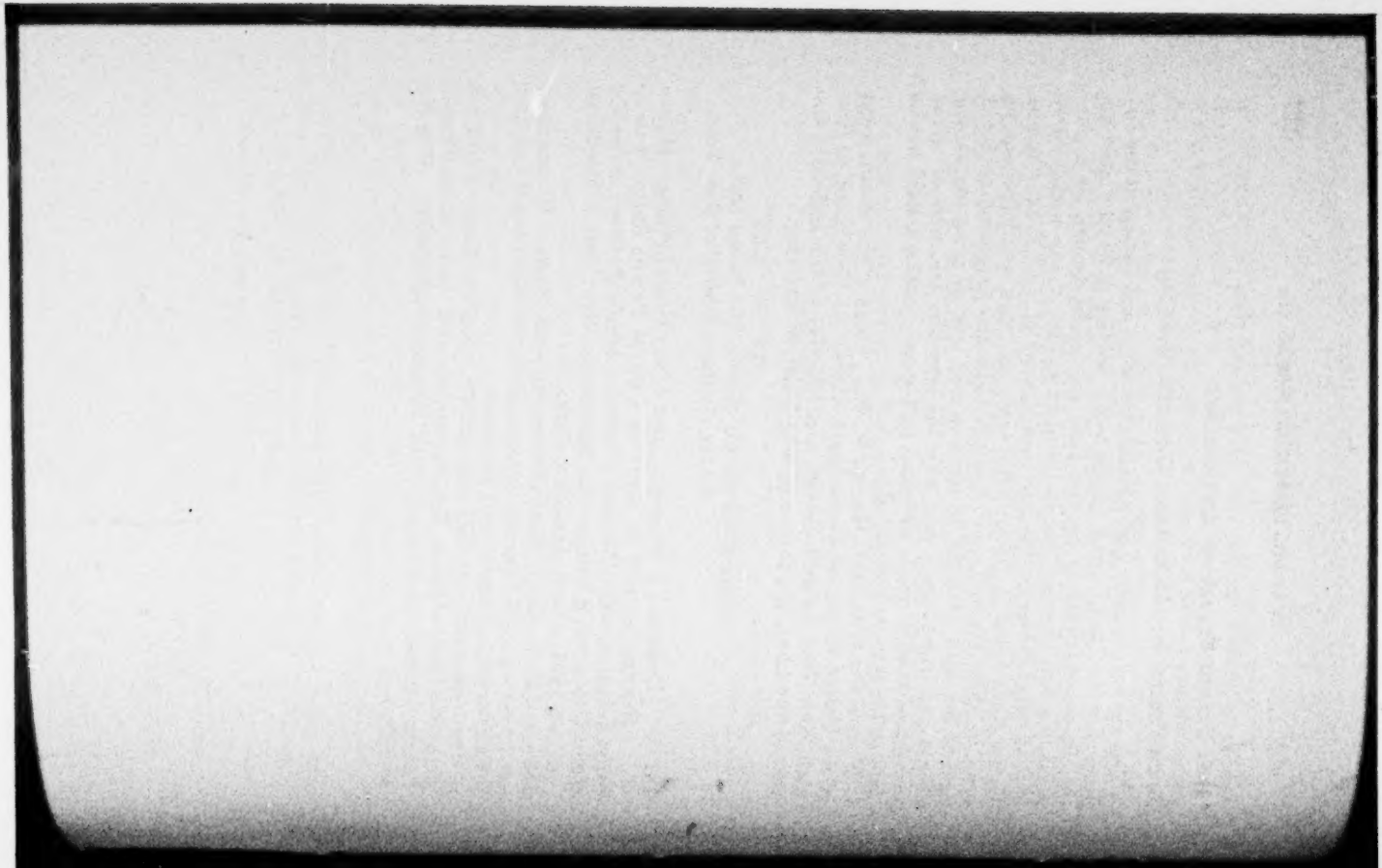
Witness the Honorable George W. Ray, judge of the circuit court of the United States for the northern district of New York, at Norwich, New York, in said district, this 15th day of November, in the year of our Lord, one thousand nine hundred and four.

GEO. W. RAY,
*Judge of the Circuit Court of the United States*
*for the Northern District of New York.*

182 [Endorsed:] Supreme Court of the United States. Hiram Remington, pl'ff in error, *vs.* Central Pacific Railroad Company, def't in error. Citation. Brown, Carlisle & Hugo, att'ys for plaintiff in error, # 8 Stone St., Watertown, New York. Filed Dec. 2, 1904. W. S. Doolittle, clerk.

183 [Endorsed:] United States Supreme Court. Hiram Remington, pl'ff in error, *vs.* Central Pacific Railroad Company, def't in error. Return to writ of error.

Endorsed on cover: File No. 19,560. N. New York C. C. U. S. Term No. 460. Hiram Remington, plaintiff in error, *vs.* Central Pacific Railroad Company. Filed December 12th, 1904. File No. 19,560.



# SUPREME COURT OF THE UNITED STATES.

**October Term, 1904.**
**No. 460.**

HIRAM REMINGTON,
*Plaintiff in Error,*
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

## MOTION AND NOTICE OF MOTION TO ADVANCE UNDER RULE 32.

Now comes Hiram Remington, the plaintiff in error, by his counsel, and moves the Court, that the above entitled case be advanced under Rule 32 and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals, upon the ground that this case is brought to this Court by writ of error under Section 5 of the Act of March 3, 1891, Chapter 517, and the only question in issue in the case is the question of the jurisdiction of the court below.

The action was brought by the plaintiff in error in the Supreme Court of the state of New York. The defendant, Central Pacific Railroad Company, made a motion in the state court to set aside the service of the summons on the defendant. This motion was denied by an order of the state court duly entered (Printed Record, p. 29). Thereafter

the defendant filed in the state court a petition and bond for the removal of the action to the Circuit Court of the United States for the northern district of New York on the ground of diverse citizenship (Printed Record, p. 2).

After the filing of the record on removal in the court below, the defendant made another motion in that court (by an order to show cause) to set aside the service of the summons on the defendant (Printed Record, pp. 73-93). The plaintiff filed written objections in the court below to the hearing, consideration or decision by the court below of said motion or order to show cause, upon grounds going to the jurisdiction of the court below (Printed Record, pp. 96 and 97). The plaintiff made a motion in the court below to remand the action to the state court, whence it came, upon grounds going to the jurisdiction of the court below (Printed Record, pp. 95-96).

The court below denied plaintiff's motion to remand (Printed Record, pp. 76-77), granted defendant's motion to set aside the service of the summons (Printed Record, pp. 77-78) and rendered judgment dismissing the action for want of jurisdiction of the defendant (Printed Record, pp. 78-79). The recitals in this judgment show the jurisdictional question.

The certificate at the end of the bill of exceptions, made by the judge before whom all the proceedings in the action in the court below were had, contains the following: "I further certify that the jurisdiction of the Court is in issue in said case and is the only question arising in said case." (Printed Record, p. 105.) The bill of exceptions shows the jurisdictional question.

The petition of the plaintiff for the writ of error sets forth the jurisdictional question (Printed Record, pp. 106-107). The order of the court below allowing the writ of error shows that the only question arising in the case and the only question tried and decided by the court below was the question of the jurisdiction of that court and allows the writ of error solely upon the question of the jurisdiction of the court, as prayed for in said petition (Printed Record, pp. 113-114). The printed brief or argument for the plaintiff in error is herewith submitted to the Court as prescribed in Subdivision 4 of Rule 6.

Dated, January 14th, 1905.

JAMES G. FLANDERS,
*Of Counsel for Plaintiff in Error.*

TO MAXWELL EVARTS, ESQ.,
*Of counsel for Central Pacific Railroad Company, Defendant in Error:*

Please take notice that I shall present and make the foregoing motion in the Supreme Court of the United States, at the place of holding said court, in the City of Washington, District of Columbia, on Monday, the 13th day of February, A. D. 1905, at the opening of court on that day or as soon thereafter as counsel can be heard, and at the same time and place I shall submit to said Court the printed brief or argument for the plaintiff in error in the above entitled case, a copy of which is herewith served upon you, in accordance with Rules 32 and 6 of said court.

Dated, January 14th, 1905.

JAMES G. FLANDERS,
*Of Counsel for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES.

**October Term, 1904.**
**No. 460.**

HIRAM REMINGTON,
*Plaintiff in Error,*
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

This is a writ of error to the Circuit Court of the United States for the Northern District of New York, allowed under Section 5 of the act of March 3, 1891, Chapter 517, for the purpose of reviewing the question of the jurisdiction of the Court below, which is the only question in issue in the case.

For the purpose of having the case advanced under Rule 32, the plaintiff in error, in accordance with the rule, submits this brief to the consideration of the Court, without oral argument, as prescribed in Rule 6, in regard to motions to dismiss writs of error and appeals. The reason for thus expediting the case and waiving the benefit of an oral argument is that the plaintiff in error is nearly

89 years of age and infirm. The case has been delayed nearly two years by preliminary proceedings.

The action was brought by the plaintiff in error in the Supreme Court of the State of New York. After making a motion in the State Court to set aside the service of the summons, and after the entry of an order by the State Court denying such motion, the defendant filed in the State Court a petition for the removal of the suit to the Circuit Court of the United States for the Northern District of New York on the ground of diverse citizenship. After the filing of the record on removal in the Circuit Court of the United States, the defendant made another motion to set aside the service of the summons on affidavits similar to those used in the State Court. The plaintiff moved to remand the suit to the State Court on grounds hereinafter stated. The two motions were heard at the same time; the Court denied the motion to remand, granted the motion to set aside the service of the summons and rendered judgment dismissing the action for want of jurisdiction of the defendant.

## STEPS TAKEN IN THE CASE.

1. On the 10th day of April, 1903, the summons in the action, without the complaint, with the venue laid in Jefferson County, New York, was personally served upon the defendant by the delivery of a copy of the same to one J. C. Stubbs, a director of the defendant, in the State of New York. This summons was in the form prescribed by sections 417 and 418 of the Code of Civil Procedure of the State of New York, required the service of the defendant's answer on plaintiff's attorneys within

twenty days after service of the summons, exclusive of the day of service, and contained the following: "In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint." (Printed Record, p. 70.)

2. On the 22nd day of April, 1903, the defendant's attorneys obtained from the plaintiff's attorneys the following stipulation signed by them, to wit: "Stipulated that the defendant may have twenty days additional time in which to appear generally or specially herein, or for the purpose of moving to vacate the service of the summons in this action." (Printed Record, p. 72.) This stipulation was filed in the office of the county clerk of Jefferson County, on the 18th day of November, 1903, after the record on removal had been transmitted to the Court below, and a copy of said stipulation was transmitted to the Court below in a supplemental record on removal, filed November 19, 1903. (Printed Record, p. 73.)

3. On May 11, 1903, the defendant's attorneys served upon the plaintiff's attorneys a notice that they appeared in the action for the purpose only of making a motion therein to set aside the service of the summons therein on the defendant. (Printed Record, p. 70.)

4. On May 11, 1903, the defendant's attorneys served on the plaintiff's attorneys a notice of a motion, to be heard at a Special Term of the said State Court on May 16, 1903, "for an order setting aside the service of the summons herein, on the ground that such service was irregular, defective, null and void and of no effect; or for such other or further order as may be proper, with costs of motion."

(Printed Record, p. 69.) This motion was made upon an affidavit of said J. C. Stubbs, stating that he was a resident of the city of Chicago, Illinois, and was not a resident of the State of New York when the summons was served; that on the 10th day of April, 1903, a copy of said summons was served upon him while he was in the city of New York for a few days upon business in no way connected with the business of the defendant; that at the time of such service he was a director of the defendant; that the defendant is a corporation organized under the laws of the State of California, and it does no business whatever in the State of New York and has no property within said state; and that, if a cause of action exists in favor of the plaintiff against the defendant, he did not believe that it arose within the State of New York. (Printed Record, p. 68.)

5. The hearing of this motion was continued by stipulation to a Special Term, held May 25, 1903. (Printed Record, p. 30.)

6. On the 23rd day of May, 1903, the defendant's attorneys procured from the plaintiff's attorneys the following stipulation, signed by them, to wit: "The defendant may have ten days time after the hearing and decision of the motion herein to appear generally in case the said motion be decided in favor of the plaintiff. This stipulation shall in no way affect any of plaintiff's rights on account of any prior appearance herein, or be deemed a waiver of any of plaintiff's rights herein." (Printed Record, p. 72.) This stipulation was filed in the office of the county clerk of Jefferson County on the 18th day of November, 1903, after the record on removal had been transmitted to the Court below, and a

copy of said stipulation was transmitted to the Court below in a supplemental record on removal filed November 19, 1903. (Printed Record, p. 73.)

7. The motion was not heard at the special term held May 25, 1903, the justice who held the term declining to hear the same for the reason that he had acted as counsel for the plaintiff previous to his election. (Printed Record, p. 30.)

8. The hearing of said motion was then fixed by agreement for a special term held June 9, 1903. (Printed Record, p. 30.) At that time the defendant's attorneys made the motion and presented the moving papers, and were heard in support of said motion, and the plaintiff's attorneys presented certain affidavits in opposition thereto, and were heard in opposition thereto. Thereupon the attorneys of the defendant asked that defendant be permitted to serve additional affidavits in support of said motion, and the Court "ordered that the defendant may serve additional affidavits on plaintiff's attorneys on or before July 1, 1903, and that said motion be postponed and heard at a special term to be held by Mr. Justice Andrews at Syracuse, N. Y., July 11, 1903." (Printed Record, pp. 30 and 46.)

9. The motion was not heard on July 11, 1903, on account of the illness of one of defendant's attorneys, but on the 24th day of August, 1903, the plaintiff's attorneys and the defendant's attorneys signed a stipulation which, after reciting the various adjournments of said motion, continued as follows: "and it is desired that said motion, and all papers in connection therewith, should be submitted to Hon. William S. Andrews, Justice of the Supreme Court, for his decision;

"It is now hereby stipulated that said motion

and all papers in connection therewith be submitted to said justice, as of the special term heretofore appointed to be held at the court house in the city of Syracuse, N. Y., on the 11th day of July, 1903, with the same force and effect as if said motion papers had been submitted at said special term." (Printed Record, p. 30.)

10. On this motion, the defendant submitted four affidavits, one being that of J. C. Stubbs, hereinbefore mentioned, and one that of Mr. Maxwell Evarts, counsel for the defendant. Mr. Evarts, among other things, denied in this affidavit that the defendant had had any property of any kind whatever in the State of New York since the 29th day of July, 1899, and averred that since that date the defendant had not done or transacted any business within said state. (Printed Record, pp. 35 and 36.) In opposition to said motion, the plaintiff presented twelve affidavits and a certificate of the Secretary of State of the State of New York. (Printed Record, p. 29.) In one of said affidavits, verified May 16, 1903, and presumably read in court June 9, 1903, made by one of plaintiff's counsel, it was shown that the amount involved in the action was large. (Printed Record, p. 64.)

11. On the 28th day of September, 1903, the State Court, by Mr. Justice Andrews, made an order denying the defendant's motion to set aside the service of the summons, with ten dollars costs to the plaintiff. (Printed Record, p. 29.) This order was entered in Jefferson County Clerk's Office on October 2, 1903, and on the same day a copy thereof, with notice of such entry, was served on defendant's attorneys. (Printed Record, pp. 71 and 102.)

12. On the 15th day of October, 1903, the de-

fendant's attorneys served on plaintiff's attorneys, and filed in the office of the county clerk of Jefferson County, notice of appeal to the Appellate Division of the Supreme Court, Fourth Department, from said order dated September 28, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons. (Printed Record, pp. 26, 28, 71 and 102.)

13. On the 16th day of October, 1903, the defendant's attorneys served upon the plaintiff's attorneys an affidavit made by Mr. Thomas Burns, one of the defendant's attorneys, verified October 16, 1903, in which, among other things, he said:

> "That on October 15, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order (entered October 2, 1903) to the Appellate Division of this court, Fourth Department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this Court for judgment herein." (Printed Record, p. 26.)

With the said affidavit, the defendant's attorneys served on plaintiff's attorneys a notice that upon said affidavit and upon all papers theretofore served or filed they would move the Court at a special term to be held at Syracuse on the 24th day of October, 1903, for an order staying all proceedings on the part of the plaintiff under said order entered October 2, 1903, until the decision of said appeal, "or for such other relief as may be just." (Printed Record, pp. 25 and 102.)

14. On the 16th day of October, 1903, the plain-

tiff made an affidavit in said action for the purpose of procuring an order for the taking of his examination by deposition. In this affidavit the plaintiff, among other things, said that no appearance had been made by the defendant except the appearance hereinbefore mentioned, and:

> "That the complaint in said action has been prepared and verified by the plaintiff, but has not been served upon the defendant or its attorneys, for the reason that no demand for said complaint has been made by or on behalf of said defendant. That no answer has been served in said action. That the nature of said action and the substance of said plaintiff's cause of action are as follows: That this action is brought for the purpose of recovering damages from the defendant, Central Pacific Railroad Company, amounting to $414,492.64 and interest thereon from the 10th day of April, 1903, besides the costs and disbursements of this action, which damages arise out of the following facts." (Stating the facts somewhat in detail.) * * * "That the judgment demanded in this action is for the recovery from the defendant of the sum of $414,492.64, with interest thereon from the 10th day of April, 1903, and the costs and disbursements of this action." (Printed Record, pp. 9 and 14.)

15. On the 19th day of October, 1903, the plaintiff's attorneys presented said plaintiff's affidavit and certain other affidavits to the county judge of Jefferson County, N. Y., and obtained from him thereon an order for the taking of plaintiff's examination by deposition in said action on the 2nd day of November, 1903, and on October 19, 1903, said affidavits were filed and said order entered in the office of the county clerk of Jefferson County, N. Y. (Printed Record, pp. 7, 71, 102.)

16. On the 22nd day of October, 1903, the de-

fendant's attorneys had learned that the amount sought to be recovered by the plaintiff in said action exceeded the sum of $2,000, exclusive of interest and costs, and on that day procured the execution of the bond for the purpose of procuring the removal of said action to the Circuit Court of the United States. (Printed Record, pp. 4, 102.)

17. On the 23rd day of October, 1903, said order for the taking of plaintiff's deposition and the affidavits on which it was granted, including said affidavit of the plaintiff, verified October 16, 1903, were served upon defendant's attorneys. (Printed Record, p. 102.)

18. On the 24th day of October, 1903, the motion of defendant's attorneys for a stay was, in accordance with the notice served by them as stated, submitted to said State Court at a special term held at Syracuse, N. Y., and the defendant's attorneys then presented said affidavit of Thomas Burns, verified October 16, 1903, to the Court in support of said motion, and were heard by the Court in support thereof, and the plaintiff's attorneys presented the affidavit of Mr. Frederick H. Remington in opposition to said motion, and were heard in opposition thereto, and thereupon the Court made an order which, after reciting the making of the order, entered October 2, 1903, denying the motion made by the defendant to set aside the service of the summons, the appeal therefrom taken by the defendant to the Appellate Division of the court, the reading and filing of said affidavit of Thomas Burns, the notice of the motion and the said affidavit of Frederick H. Remington, and the hearing of the attorneys for the respective parties, proceeded as follows:

"Ordered, that the defendant be relieved from any default in appearing herein and that all proceedings on the part of the plaintiff be stayed, pending said appeal and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein, granted by Hon. E. C. Emerson, County Judge of Jefferson County, and entered in said clerk's office October 19, 1903.

"Let the papers upon which this motion was made be filed and this order entered in Jefferson County."

Enter

W. S. A., J. S. C."

Approved

P. W. & B.

B. C. & H." (Printed Record, p. 24.)

The date of this order is given in the caption thereof as October 24, 1903. The initials after the word "approved" are the initials of the attorneys for the respective parties.

The affidavit of Mr. Frederick H. Remington, mentioned in said order, showed that it was very important to the plaintiff and would be very important to his personal representatives, in case of his death before the trial of the action, to have his deposition taken on November 2, 1903, in accordance with the order granted therefor by the county judge, to preserve plaintiff's testimony. It appeared from this affidavit that the plaintiff was then 87 years of age, infirm in health, and that he was the only witness to certain facts, without proof of which it would be impossible for the plaintiff or for his personal representatives, in case of his death before the trial of the action, and their substitution in the action as plaintiffs, to recover in the action. (Printed Record, pp. 26 and 27.)

19. On October 26, 1903, the said order staying proceedings and the affidavits mentioned therein were filed and said order entered in the office of the county clerk of Jefferson County. (Printed Record, pp. 71, 102.)

20. On October 26, 1903, the petition of the defendant for the removal of the suit to the Circuit Court of the United States for the Northern District of New York, on the ground of diverse citizenship, was made and verified, and it and said bond on removal, dated October 22, 1903, were presented to a justice of said State Court at Chambers. Said justice thereupon endorsed upon said petition: "Read on application, October 26, 1903. W. M. R., J. S. C." (Printed Record, pp. 2 and 3), and endorsed upon said bond: "I hereby approve of the within bond as to form and sufficiency of surety. Dated October 26, 1903, Watson M. Rogers, J. S. C." (Printed Record, p. 6.) On the same day, this petition and bond were filed in the office of the county clerk of Jefferson County, N. Y. (Printed Record, pp. 72-102.) The said petition and bond were never presented to the State Court in session, and no order relating thereto or for the removal of said cause to the Circuit Court of the United States was obtained from the State Court. (Printed Record, pp. 71-97-98-102.) This petition (omitting the title, prayer, signature and verification) reads as follows:

> *"To the Honorable The Supreme Court of the State of New York:*
>
> The petition of the Central Pacific Railroad Company, appearing specially and for the sole and single purpose of presenting this petition, respectfully showeth:
>
> That heretofore and on or about the 10th

day of April, 1903, the above entitled suit, which is a suit of a civil nature, was brought in this court by Hiram Remington against your petitioner as defendant. That your petitioner, at the time of the commencement of said suit, was and has ever since been and still is a foreign corporation, organized and created under the laws of the State of California, and at all such times was and still is a citizen and resident of the State of California, and a non-resident of the State of New York. That the plaintiff at the time of the commencement of said suit was and has ever since been and still is a citizen and resident of the State of New York. That said suit is a suit of a civil nature in which there is a controversy between citizens of different states, and that the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $2,000.

That said suit is pending undetermined in this court; and that the time has not yet arrived at which the defendant is required by the laws of the State of New York, or the rules of the Supreme Court of the State of New York, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, and that no application has been made to any court or judge for the order to be applied for upon this petition." (Printed Record, p. 2.)

21. On November 4, 1903, the record on removal in said cause, certified by the county clerk of Jefferson County, was filed in the office of the clerk of the Circuit Court of the United States for the Northern District of New York (Printed Record, p. 72), and on the 19th day of November, 1903, a supplemental record on removal was filed, containing two stipulations. (Printed Record, p. 73.)

22. On the 5th day of November, 1903, the defendant obtained from Hon. George W. Ray, U. S. District Judge, upon an affidavit of said J. C.

Stubbs, verified October 30, 1903, an order requiring the plaintiff or his attorneys to show cause before the Circuit Court of the United States for the Northern District of New York, on the 10th day of November, 1903, at one o'clock P. M., why the service of the summons in the action should not be set aside. This order also contained the following:

> "Ordered, that the time of the defendant to enter a general appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause." (Printed Record, pp. 73 and 74.)

The order made by the State Court denying defendant's motion to set aside the service of the summons had not been set aside or reversed, but remained, and still remains, in full force and effect. Said order of the State Court did not contain any leave to the defendant to renew its motion to set aside the service of the summons, and no leave to renew said motion has been granted either by the State Court or by the Circuit Court of the United States.

The affidavit of J. C. Stubbs, upon which this order to show cause was made, states in substance that he resides and has an office in the city of Chicago, Illinois, and was not, at the date of the affidavit or at the date of the service of said summons upon him, a resident of the State of New York; that on the 10th day of April, 1903, a copy of the summons in this suit was served upon him while he was in the city of New York for a few days upon business in no way connected with the business of the defendant; that he was a director of the defendant company at the time of such service; that the defendant is a corporation organized under the laws

of the State of California and, at the time of the service of said summons upon him, did no business whatever in the State of New York and had no property or office within said state; and that on the 29th day of July, 1899, the defendant transferred all its property and franchises to the Central Pacific Railway Company, a corporation of the State of Utah, and since that date has done no business and has had no property in the State of New York. (Printed Record, pp. 74-94.)

This affidavit and the order to show cause were served upon the plaintiff's attorneys on the 6th day of November, 1903. (Printed Record, p. 95.)

On the 25th day of November, 1903, Mr. Maxwell Evarts verified an affidavit, which was filed and presented to the Court in support of said order to show cause. In this affidavit Mr. Evarts said in substance that the defendant had done no business of any kind in the State of New York since July 29, 1899; that since that date it has had no office in the State of New York for the transaction of business and no property therein; that on July 29, 1899, the defendant transferred to the Central Pacific Railway Company all its property, by an indenture and agreement, a copy of which was attached to the affidavit and marked "Exhibit A." (Printed Record, p. 103.) It will be noted that these affidavits of Mr. Stubbs and Mr. Evarts are substantially the same as the affidavits of the same persons, made in support of the motion to set aside the service of the summons in the State Court. Both these affidavits in the United States Court will be found in the bill of exceptions (Printed Record, pp. 94, 103), and the affidavits of the same persons in the Record on

Removal, certified by the county clerk of Jefferson County. (Printed Record, pp. 35, 36-68.)

23. On the 10th day of November, 1903, and before the hearing of said order to show cause, the plaintiff's attorneys filed written objections to the hearing, consideration or decision by the Court of said motion or order to show cause why the service of the summons in said action should not be set aside for the following reasons, to wit:

> "1st. Because said defendant did not, as by law required, make and file a petition in said action in the State Court for the removal of said suit into this court (the court below) at or before the time the defendant was required by the laws of the State of New York or by the rules of the Supreme Court of New York to answer or plead to the complaint or declaration of the plaintiff.
>
> 2nd. Because this Court (the court below) has no jurisdiction to hear, consider or decide said motion or order to show cause or to do anything in said action except to remand the same to the State Court.
>
> 3rd. Because no such bond as is required by law accompanied the said petition or was filed.
>
> 4th. Because the said petition for removal was and is insufficient in law and according to the statute and practice." (Bill of Exceptions, Printed Record, pp. 96, 97.)

In addition to said written objections, it was also urged, upon the hearing of said order to show cause why the service of the summons should not be set aside, by the plaintiff's counsel and in the briefs of plaintiff's counsel in opposition to said motion, that said Circuit Court of the United States could not review and could not set aside the order made in the State Court in said action on the 28th day of September, 1903, and entered October 2, 1903,

denying the defendant's motion to set aside the service of said summons, and that said order was an adjudication that was binding on said Circuit Court. (Bill of Exceptions, Printed Record, p. 97.)

24. After the filing of said objections and before the hearing of said order to show cause, the plaintiff's attorneys served upon the defendant's attorneys, and duly filed in said Circuit Court of the United States, a motion in writing to remand said cause to the Supreme Court of the State of New York, in and for Jefferson County, on the following grounds:

> "1. The defendant waived and is estopped from asserting any right it may have had to remove said cause from the said State Court to the Circuit Court of the United States in and for the Northern District of New York by reason of the fact that the defendant procured an order from said State Court in said action on the 24th day of October, 1903, and caused the same to be entered in the office of the clerk of said State Court on the 26th day of October, 1903, which order stayed all proceedings on the part of the plaintiff in said action pending the appeal which had been taken by the defendant to the Appellate Division of the Supreme Court, Fourth Department, in the State of New York, from an order made in said action by the Supreme Court of the State of New York, and entered on the 2nd day of October, 1903, denying a motion made by said defendant to set aside the service of the summons in said action and until ten days after the decision of said appeal, 'except that this order shall not stay the order for the examination of the plaintiff herein, granted by Hon. E. C. Emerson, county judge of Jefferson County, and entered in said clerk's office October 19, 1903,' which said order procured by the defendant, dated October 24, 1903, was made upon an affidavit of Thomas Burns, one of the defendant's attor-

neys in said action, made on the 16th day of October, 1903, which contained the following: 'that on the 2nd day of October, 1903, an order was entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no complaint has been served or filed herein, as deponent is informed and believes. That on October 15, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the Appellate Division of this court, Fourth Department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that said defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this Court for judgment herein.'

2. The petition for the removal of said cause from the Supreme Court of the State of New York to the Circuit Court of the United States, in and for the Northern District of New York, was not filed at the time, or any time before, the defendant in said cause was required by the laws of said state, or the rules of said State Court in which said suit was brought, to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter.

3. The said petition for removal and the bond filed therewith were not presented to the said State Court.

4. The Circuit Court of the United States, in and for the Northern District of New York, is without jurisdiction to hear and determine the cause." (Bill of Exceptions, Printed Rec ord, pp. 95-96.)

Each of said grounds was also presented to the Court by plaintiff's counsel on the argument of said motion to remand, and in the briefs of plaintiff's counsel, and was discussed by defendant's counsel in their briefs, and all of said briefs were submitted to the Court upon the hearing of said motion to remand. (Bill of Exceptions, Printed Record, p. 96.)

25. In support of said motion to remand, the plaintiff read to the Court and filed affidavits of Mr. Willard E. Saxe, special deputy clerk of said State Court, and of Mr. Francis M. Hugo and Mr. John N. Carlisle, two of plaintiff's attorneys. It appeared from the affidavits of Mr. Saxe and Mr. Hugo, that said petition and bond for removal were presented to a justice of the State Court at Chambers and not while holding any term of court. (Bill of Exceptions, Printed Record, pp. 97-98.) The affidavit of Mr. John N. Carlisle sets forth in full Rule 24 of the State Court, which rule relates to orders extending time to answer. The said affidavit then proceeds as follows:

> "That the said Rule 24 was in force at the commencement of this action, and has ever since been in force and effect; that said Rule 24 was never complied with by the defendant in this action; that no affidavit or proof was ever presented, served or filed by the defendant in this action, as provided in said Rule 24; that no notice of an application for an order for any extension of time to answer or demur was ever served by or in behalf of the defendant in said action; that no copy of any demurrer or of any answer in said action was ever served by or on behalf of the defendant therein; that the defendant's time to answer, demur or plead, or to demand a copy of the complaint in said action, has never been extended by a stipulation or order or otherwise; that the de-

fendant's time to appear in said action has not been extended by stipulation, order or otherwise, except that on the 22nd day of April, 1903, the plaintiff's attorneys gave the defendant's attorneys a stipulation giving the defendant twenty days additional time in which to appear, generally or specially, in said action, or for the purpose of moving to vacate the summons therein; and on the 23rd day of May, 1903, the plaintiff's attorneys gave the defendant's attorneys a stipulation giving the defendant ten days time after the hearing and decision of the defendant's motion to set aside the service of the summons to appear generally in case the said motion be decided in favor of the plaintiff; that this stipulation contained a provision that it should not be deemed a waiver of any of the plaintiff's rights; that the defendant in said action was in default and the plaintiff could have applied for judgment in said action between the 20th day of May and the 23rd day of May, 1903; and the defendant again became in default in said action ten days after the decision of said motion in favor of the plaintiff on the 28th day of September, 1903, said ten days expiring on the 8th day of October, 1903; that from the said 8th day of October, 1903, until the filing of the petition and bond for the removal of this action to the Circuit Court of the United States, for the Northern District of New York, on the 26th day of October, 1903, the defendant was in default in said action and the plaintiff could have applied to the Court for judgment in said action, except that on the 24th day of October, 1903, the Court granted a stay of proceedings which had the effect to prevent such application for judgment until ten days after the decision of the appeal taken by the defendant in said action; that the defendant was in default at the time of filing the petition and bond for removal of said motion (action) to this Court." (Bill of Exceptions, Printed Record, p. 100.)

In support of said motion to remand and in opposition to said order to show cause, the plaintiff's attorneys also read the record on removal, certified by the clerk of the State Court. (Printed Record, p. 101-104.)

26. In opposition to the motion to remand the suit to said State Court, the defendant's counsel read to the Court and filed the affidavit of Mr. Henry Purcell, one of defendant's attorneys, which after reciting certain steps in said action, which appeared in the record on removal, contained the following:

> "Deponent further says, that on June 25, he was suddenly taken ill, left his office, and on account of his illness did not return to it and was not able to return to it until October 15, 1903. That on Sept. 28, Justice Andrews denied defendant's motion to vacate the service of said summons and his order thereon was entered in Jefferson County clerk's office Oct. 2, and a copy thereof with notice of such entry was on the day last mentioned served on deponent's said firm. That on Oct. 15, defendant filed and served notice of appeal from the order denying the said motion and on that day, deponent discovered that the defendant was in default in appearing. That this was due entirely to deponent's illness. That on Oct. 16, defendant moved for stay of proceedings pending the appeal taken from the said order and upon said motion coming on on Oct. 24, an order was made staying all proceedings on the part of the plaintiff, with the exception of the examination of the plaintiff before trial until ten days after the decision of the said appeal and relieving defendant from any default in appearing that then existed. This order was approved by the plaintiff's attorneys in writing upon the face thereof, was made on a Saturday at Syracuse, New York, and was entered in Jefferson County Clerk's office Monday,

Oct. 26, 1903, which was as soon as it could be entered after it was made. That on the same day, Oct. 26, deponent, on behalf of the defendant, presented its petition and bond for removal of this cause to the United States Circuit Court for the Northern District of New York to Mr. Justice Rogers, a Judge of the Supreme Court of this state, who received the said petition and approved of said bond and the same with said petition was thereupon filed in said clerk's office on the same day, to wit, October 26, 1903.

Deponent further says that on or about October 19, 1903, the plaintiff applied *ex parte* upon the affidavits of the plaintiff, Hiram Remington, and others, to the County Judge of Jefferson County for an order to examine the said plaintiff before trial which was granted on that day by said Judge, and thereafter and on October 23, 1903, copies of said affidavits and order were served on deponent's firm. That it was on the day last mentioned, to-wit, October 23, 1903, that it appeared for the first time from the papers or record in this action that the amount involved therein was two thousand dollars, exclusive of interest and costs, and this was shown and appears by a statement in the said last mentioned affidavit of Hiram Remington when he states in substance that the action was brought to recover $414,492.64.

That the case thereupon became a removable controversy and deponent as soon as possible thereafter made application for its removal. This deponent further states that he was advised informally on October 22, 1903, but not by the record herein, that the case would probably involve more than two thousand dollars and then out of abundant precaution obtained the bond on removal so as to be prepared to remove the action in case it became of record a removable one.

Deponent further says, that no complaint herein has been filed to his knowledge in the

clerk's office of Jefferson County nor has any been served upon him or his firm." (Bill of Exceptions, Printed Record, pp. 101-102.)

27. The said motion to remand said cause to the State Court, and said order to show cause why the service of the summons should not be set aside, came on for hearing and argument at the same time, at a stated term of said Circuit Court of the United States before Hon. Geo. W. Ray, District Judge. (Printed Record, p. 104.)

On the 23rd day of July, 1904, the Court below made an order at a stated term, denying said motion to remand, and on the same day, made an order granting defendant's said motion (arising on said order to show cause) to set aside the service of the summons and setting aside the said summons and the service thereof and declaring the same to be null and void and of no effect. Each of said orders was filed and entered on the 25th day of July, 1904. (Printed Record, pp. 76-77 and 104.)

No opinion was written by the Court below. (Printed Record, p. 105.)

28. On the 12th day of August, 1904, during the same term of court, at which said two orders were made and entered, the plaintiff duly filed his exceptions to each of said orders, which exceptions were signed by plaintiff's attorneys, were allowed by the Court and are set forth in the bill of exceptions. (Printed Record, pp. 104-105.) The following recital appears in the judgment: "And the plaintiff having duly excepted to each of said two decisions and orders, which exceptions are allowed by the Court." (Printed Record, p. 79.)

29. On the 23rd day of August, 1904, during the same term of court at which said orders were

made and entered, the Court below rendered its judgment, signed by Judge Ray, dismissing the action for want of jurisdiction of the defendant, which judgment was entered August 30, 1904. (Printed Record, pp. 78-79-105.) This judgment recites that the plaintiff duly made a motion in the said Circuit Court of the United States to remand said cause to the State Court on the following grounds, to-wit: (1) that the defendant had waived and was estopped from asserting any right it may have had to remove said cause to said Circuit Court of the United States by reason of certain proceedings taken by the defendant in said State Court and specified in said motion; (2) that the petition for the removal of said cause from said State Court to said Circuit Court was not filed at the time or at any time before the defendant was required by the laws of said State or the rules of said State Court in which said suit was brought to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter and too late to effect a removal of this suit to said Circuit Court; (3) that said petition for removal and the bond filed therewith were not presented to the said State Court in session; and (4) that said Circuit Court is without jurisdiction to hear and determine the cause.

Said judgment also recites the defendant's motion or order to show cause why the service of the summons on the defendant should not be set aside and that the plaintiff duly objected to the hearing, consideration or decision by said Circuit Court of the United States of said motion or order to show cause, on the above grounds and also on the ground that said Circuit Court had no jurisdiction to hear,

consider or decide said motion or order to show cause or do anything in this action except to remand the same to the State Court; and that the plaintiff also urged, upon the argument of the last mentioned motion, that the order made by said State Court denying defendant's motion to set aside the said service of said summons on the defendant, was an adjudication that was binding on said Circuit Court and could not be reviewed by said Court.

This judgment also recites the orders made by said Circuit Court denying plaintiff's motion to remand and granting the defendant's motion to set aside the service of said summons, and that the plaintiff had duly excepted to each of said two decisions and orders "which exceptions are allowed by the Court." (Printed Record, pp. 78-79.)

30. On the 16th day of September, 1904, during the same term of court at which said two orders were made and entered and said judgment was rendered and entered, the bill of exceptions in said case was settled, allowed, signed, certified and made a part of the record in said cause, by Hon. Geo. W. Ray, the Judge of said Circuit Court before whom all the proceedings in said cause in said Circuit Court were had. Said bill of exceptions shows, among other things, the questions concerning the jurisdiction of the Court and the said orders and judgment rendered by the Court below. The certificate to said bill of exceptions signed by said Judge, among other things, contains the following:

> "And I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the Court is in issue in said case and is the only

question arising in said case." (Printed Record, p. 105.)

This bill of exceptions was filed in the office of the clerk of said Circuit Court on the 20th day of September, 1904. (Printed Record, p. 105.)

31. On the 14th day of November, 1904, the plaintiff's petition for a writ of error to the Supreme Court of the United States to the end that said orders, rulings, decisions and judgment may be reviewed by said Supreme Court upon the question of the jurisdiction of the Court thereby determined, and that the errors complained of may be corrected, was presented, together with plaintiff's assignment of errors, to said Circuit Court of the United States, Judge Ray presiding. This petition stated the proceedings had in said Circuit Court and the jurisdictional question arising therein. (Printed Record, pp. 106-107.)

The assignment of errors concludes as follows:

"And the said plaintiff, Hiram Remington, prays that the orders and judgment aforesaid made and rendered by said Circuit Court of the United States may be reversed, annulled and altogether held for naught, and that this cause may be remanded to the Supreme Court of the State of New York in and for Jefferson County, and that the plaintiff may be restored to all things which he hath lost by occasion of said orders and judgment." (Printed Record, p. 111.)

32. On the 15th day of November, 1904, during the same term of court at which said two orders were made and entered, and at which said judgment was rendered and entered and said bill of exceptions was signed and filed, Hon. George W. Ray, District Judge of said District, approved the bond for said writ of error as to form and sufficiency of

sureties, and accepted the same as good and sufficient security upon the writ of error and at the same time said Circuit Court of the United States, by said District Judge, made an order allowing and awarding said writ of error. This order, among other things, recites the presentation of plaintiff's assignment of errors and petition praying for a writ of error from said judgment and orders to the Supreme Court of the United States to review said orders, judgment, rulings and decisions upon said question of jurisdiction, and that the jurisdiction of the Court is in issue in this case, and that the only question arising in said action and the only question tried and decided by the Court therein was the question of the jurisdiction of the Court, and that a bond for said writ of error in the penalty of five hundred dollars had been duly executed and had been duly approved by the Court. This order then proceeds as follows:

> "Now, on reading and filing said petition, assignment of errors and bond, and during the same term of court, at which said orders were made and entered, and said judgment was rendered and entered; and on motion of Brown, Carlisle & Hugo, plaintiff's attorneys,
>
> It is Ordered and Considered by the Court that said writ of error to the Supreme Court of the United States, from said orders and said final judgment dismissing said suit for want of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiffs, solely upon the question of the jurisdiction of the Court as prayed for in said petition, to review the question of jurisdiction of the Court in said petition mentioned, which is the only question arising herein. (Printed Record, p. 114.)

33. On the 15th day of November, 1904, the

same day the order allowing the writ of error was made and signed, the citation in this case, returnable in this court, on the 15th day of December, 1904, was signed in said Northern District of New York by Hon. Geo. W. Ray, District Judge of said district, who also signed the order made by the Court below allowing the said writ of error. (Printed Record, p. 117.)

34. On the 18th day of November, 1904, said petition for writ of error, said assignment of errors, said bond, and said order allowing the writ of error were duly filed in the office of the clerk of said Circuit Court, and said order entered, and said writ of error issued, the return day named therein being the 15th day of December, 1904. An endorsement on the original writ of error shows that on the 18th day of November, 1904, said clerk received a true copy of said writ of error for the defendant in error. (Printed Record, p. 1.)

35. On the 23rd day of November, 1904, said citation and a certified copy of said writ of error were duly and personally served upon the attorneys for the defendant, and the original citation with proof of service of the same and of said writ of error has been returned to this Court by the clerk of said Circuit Court, with his return to said writ of error. (Printed Record, p. 115.)

36. On the 12th day of December, 1904, the return to said writ of error was filed in the office of the clerk of this Court and the case was duly docketed in this Court. (Printed Record, p. 117.)

## ASSIGNMENT OF ERRORS.

1. The Court erred in making the order dated July 23, 1904, and entered July 25, 1904, denying plaintiff's motion to remand this action to the Supreme Court of the State of New York in and for Jefferson County.

2. The Court erred in refusing to hold that the defendant waived any right it may have had to remove this suit from said State Court to the Circuit Court of the United States for the Northern District of New York, by obtaining from said State Court an order dated October 24, 1903, and entered October 26, 1903, staying all proceedings on the part of the plaintiff pending the appeal that had been taken by the defendant to the appellate division of said State Court from an order made by said State Court dated September 28, 1903, and entered October 2, 1903, denying a motion that had been made by the defendant in said State Court to set aside the service of the summons in this action and until ten days after the decision of said appeal, except that the order which had been granted for the examination of the plaintiff on November 2, 1903, should not be stayed.

3. The Court erred in refusing to hold that the defendant was estopped from removing this suit from said State Court to said Circuit Court of the United States, by reason of the fact that it had obtained said order staying proceedings.

4. The Court erred in refusing to hold that the defendant did not make and file in said State Court a petition for the removal of this suit from the Supreme Court of the State of New York in and for Jefferson County to said Circuit Court at the

time or at any time before the defendant was required by the laws of the State of New York, or the rule of the Supreme Court of the State of New York, in which such suit was brought to answer or plead to the declaration or complaint of the plaintiff.

5. The Court erred in refusing to hold that the petition and bond for removal were filed too late to effect a removal of said suit from said State Court to the Circuit Court of the United States for the Northern District of New York.

6. The Court erred in refusing to hold that the defendant was in default at the time said petition and bond for removal were filed in said State Court.

7. The Court erred in refusing to hold that there was no controversy between the plaintiff and the defendant in this action at the time said petition and bond for removal were filed in said State Court.

8. The Court erred in refusing to hold that it was not sufficient to present said petition and bond to a judge of said State Court at chambers.

9. The Court erred in refusing to hold that said petition and bond for removal should have been presented to said State Court in session.

10. The Court erred in refusing to hold that the said petition and bond for removal, were insufficient to effect a removal of this suit to said Circuit Court of the United States.

11. The Court erred in refusing to hold that because no order accepting said petition and bond or for the removal of said suit was made, this suit was not removed from said State Court to said Circuit Court of the United States.

12. The Court erred in granting the defendant's motion to set aside the service of the summons on the defendant in this action.

13. The Court erred in making the order dated July 23, 1904, and entered July 25, 1904, that the summons in this action and the service thereof on the defendant be and are in all respects set aside and declared to be null and void and of no effect.

14. The Court erred in rendering judgment in this action dismissing this action for want of jurisdiction of the defendant, which judgment was rendered on the 23rd day of August, 1904, and was entered on the 30th day of August, 1904.

15. The Court erred in refusing to hold that the order of said State Court, made in this action on September 28, 1903, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons in this action on the defendant was an adjudication that was binding upon the defendant and upon said Circuit Court of the United States.

16. The Court erred in reviewing said order of said State Court denying defendant's motion to set aside the service of the summons in this action on the defendant.

17. The Court erred in refusing to hold that the defendant had made a general appearance in this action by obtaining from the plaintiff's attorneys on the 22nd day of April, 1903, a stipulation in writing in this action giving the defendant twenty days additional time in which to appear generally or specially in said action or for the purpose of moving to vacate the service of summons in said action.

18. The Court erred in refusing to hold that

the defendant made a general appearance in this action by serving on the plaintiff's attorneys on the 11th day of May, 1903, a notice of motion to be heard in said State Court on the 16th day of May, 1903, for an order setting aside the service of the summons in said action on the ground that such service was irregular, defective, null and void and of no effect, *or for such other or further order as may be proper with costs of motion.*

19. The Court erred in refusing to hold that the defendant made a general appearance in this action by procuring from the plaintiff's attorneys on the 23rd day of May, 1903, a stipulation in writing in this action giving the defendant ten days' time after the hearing and decision of the plaintiff's motion to set aside the service of the summons in the action, to appear generally, and providing that the said stipulation should not in any way affect any of plaintiff's rights on account of any prior appearance in said action, or be deemed a waiver of any of plaintiff's rights in said action.

20. The Court erred in refusing to hold that the defendant made a general appearance in said action by serving on the plaintiff's attorneys on the 16th day of October, 1903, a notice of motion, to be heard at a special term of said State Court on the 24th day of October, 1903, for an order staying all proceedings on the part of the plaintiff, respondent, under the order entered in said action on the 2nd day of October, 1903, until the decision of the Appellate Division of said State Court, fourth department, upon the appeal taken from said order by the defendant, appellant, *or for such other relief as may be just.*

21. The Court erred in refusing to hold that the defendant made a general appearance in said action by obtaining in said action, at a special term of said State Court, on the 24th day of October, 1903, the following order: "Ordered *that the defendant be relieved from any default in appearing herein,* and that all proceedings on the part of the plaintiff be stayed pending said appeal (the appeal that had been taken by the defendant to the Appellate Division of said State Court, Fourth Department, from the order denying defendant's motion to set aside the service of the summons in said action) and until ten days after the decision thereof, except that this order shall not stay the order for the examination of the plaintiff herein granted by Hon. E. C. Emerson, County Judge of Jefferson County, and entered in the County Clerk's office of said County October 19, 1903," and by causing said order dated October 24, 1903, to be entered in the office of the County Clerk of Jefferson County on the 26th day of October, 1903.

22. The Court erred in refusing to hold that the defendant made a general appearance in this action by obtaining from a Judge of said Circuit Court on November 5, 1903, after a copy of the record in this action was filed in said Circuit Court, an order to show cause which contained the following: "Ordered that the time of the defendant to enter a general appearance in this suit be and the same is hereby extended until twenty days after the final determination of the motion arising upon this order to show cause," and by serving said order on plaintiff's attorneys on November 6, 1903, and by filing said order in the office of the clerk of said Circuit Court.

## ARGUMENT.

### I.

### CERTIFICATE CONCERNING THE JURISDICTIONAL QUESTION.

The judgment of the Court below, signed by the Judge before whom all the proceedings in that court were had, dismisses the action *"for want of jurisdiction of the defendant."* The judgment contains the following recitals, to-wit:

> "The above entitled cause having been commenced in the Supreme Court of the State of New York in and for Jefferson County, and removed to this court on the petition of the defendant; a copy of the record in said action in said State Court, duly certified by the County Clerk of said county under the seal of said State Court, having been filed in this court on the 4th day of November, 1903; the plaintiff having duly made a motion in this court to remand said cause to said State Court on the grounds that the defendant had waived and was estopped from asserting any right it may have had to remove said cause to this court by reason of certain proceedings taken by the defendant in said State Court and specified in said motion; that the petition for the removal of said cause from said State Court to this court was not filed at the time, or at any time before the defendant was required by the laws of said state or the rules of said State Court in which said suit was brought to answer or plead to the declaration or complaint of the plaintiff in said action, but was filed a long time thereafter and too late to effect a removal of this suit to this court; that said petition for removal and the bond filed therewith were not presented to the said State Court in session; and that this court is without jurisdiction to hear and determine the

cause; and the defendant by an order to show cause having made a motion in this court to set aside the service of the summons in this action on the defendant; and the plaintiff having duly objected to the hearing, consideration or decision by this Court of said motion or order to show cause on the above grounds, and also on the ground that this Court had no jurisdiction to hear, consider or decide said motion or order to show cause, or do anything in this action except to remand the same to the State Court; and the plaintiff having also urged upon the argument of the last mentioned motion that the order made by said State Court denying defendant's motion to set aside the said service of said summons on the defendant was an adjudication that was binding on this Court and could not be reviewed by this Court; and said two motions duly coming on for argument at the same time at a stated term of this court; and the Court having heard the counsel for the parties on said motions, and, after duly considering the same, having denied the said motion to remand and granted the said motion to set aside the service of said summons, and orders to that effect having been signed and entered at this term of Court; and the plaintiff having duly excepted to each of said two decisions and orders, which exceptions are allowed by the Court." (Printed Record, p. 78.)

The certificate to the bill of exceptions, signed by the judge, before whom all the proceedings in the Court below were had, at the same term at which said orders and judgment were rendered and entered, contains the following:

"And I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the Court is in issue in said case and is the only

question arising in said case." (Printed Record, p. 105.)

The bill of exceptions shows what the jurisdictional question is.

The plaintiff's petition for the writ of error first recites the commencement of the suit in the State Court, the removal thereof to the Court below, the motion made by the plaintiff to remand the same to the State Court, the defendant's motion by the order to show cause why the service of the summons on the defendant should not be set aside, the orders made by the Court on said motions, denying the plaintiff's motion and granting the defendant's motion, the exceptions of the plaintiff to said orders and the allowance of such exceptions by the Court, the judgment, rendered and entered dismissing the action for want of jurisdiction of the defendant and then proceeds as follows:

> "that in this cause the jurisdiction of the Court was and is in issue; that the only question arising herein and the only question tried and decided by this Court herein was the question of the jurisdiction of the Court; that this Court in and by said orders and judgment determined and decided in favor of the defendant and against the plaintiff in effect as follows, to wit: that said cause was properly removed from said State Court to this court; that the defendant had not waived the right to remove said cause from said State Court to this court by reason of the proceedings taken by it in said State Court; that the defendant was not estopped from removing said cause from said State Court to this court on account of proceedings taken by it in said State Court; that the petition and bond for removal were not filed in said State Court too late to effect such removal; that said petition and bond were filed in said State Court at the time or before

the time the defendant was required by the laws of the State of New York, or the rules of the Supreme Court of the State of New York, in which said suit was brought, to answer or plead to the declaration or complaint of the plaintiff; that it was not necessary to present said petition to said State Court in session, but that it was sufficient to present said petition and bond to a justice of said State Court at chambers; and that it was unnecessary to obtain any order from said State Court or a Judge thereof accepting said petition or removing said cause to this court; that the order made by said State Court on September 28, 1903, and entered October 2, 1903, denying defendant's motion to set aside the service of the summons on the defendant was not an adjudication that was binding on the defendant or on this Court; that this Court had power and jurisdiction to review said order of said State Court denying the defendant's motion to set aside the service of the summons on the defendant and make an order granting defendant's motion to set aside the service of said summons on the defendant and setting the summons and said service aside and declaring the same to be null and void and of no effect, notwithstanding said order of said State Court had not been reversed or set aside; that the service of said summons was not a legal and valid service of said summons on the defendant and said summons and said service thereof should be set aside and adjudged to be null and void and of no effect; that the defendant had not made a general appearance in the action and that the Court had no jurisdiction of the defendant;

That the plaintiff is aggrieved by the said decisions of this Court and by the judgment dismissing this action for want of jurisdiction of the defendant and by said order denying plaintiff's motion to remand this cause to said State Court and by said order granting the defendant's motion to set aside the service of

the summons on the defendant and setting aside said summons and the service thereof and declaring the same to be null and void and of no effect.

The plaintiff further says that in said order denying plaintiff's said motion to remand said suit to said State Court and in said order granting the defendant's motion to set aside the service of the summons in this action on the defendant and setting aside said summons and the service thereof on the defendant and declaring the same to be null and void and of no effect and in said judgment dismissing said action for want of jurisdiction of the defendant and in the proceedings prior thereto certain errors were committed on the question of the jurisdiction of the Court to the prejudice and great damage of this plaintiff, all of which will more in detail appear in the record in this cause and from the assignment of errors which is presented and filed with this petition.

Wherefore, this plaintiff, considering himself aggrieved, prays that a writ of error may be allowed and may issue in this behalf to the Supreme Court of the United States to the end that said orders, rulings, decisions and judgment may be reviewed by the Supreme Court of the United States upon the question of the jurisdiction of the Court thereby determined, and that the errors so complained of may be corrected and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to said Supreme Court of the United States." (Printed Record, pp. 106, 107.)

The order of the Court allowing the writ of error made November 15, 1904, during the same term at which the orders on the motions were made and entered, and the judgment was rendered and entered, signed by the judge before whom all the proceedings in the Court below were had, first recites the orders made on the motion to remand and

the motion to set aside the service of the summons and then proceeds as follows:

"and final judgment dismissing said action for want of jurisdiction of the defendant having been rendered by this Court on the 23rd day of August, 1904, and entered on the 30th day of August, 1904; and the plaintiff on the 20th day of September, 1904, during the same term at which said orders and judgment were rendered and entered, having filed his bill of exceptions in said action; and the above named plaintiff, considering himself aggrieved by the rulings of this Court upon the question of jurisdiction of the Court in said action, having on this day during said term of court presented his assignment of errors and his petition praying for a writ of error from said judgment and orders to the Supreme Court of the United States to review said orders, judgment, rulings and decisions of this Court upon said question of jurisdiction, and praying that said writ of error be allowed him to the said Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause duly authenticated be sent to said Supreme Court of the United States; and the jurisdiction of the Court being in issue in this case; and the only question arising in said action and the only question tried and decided by this Court therein being the question of the jurisdiction of the Court; and a bond for said writ of error in the penalty of five hundred dollars having been duly executed and having been approved by the Court;

Now, on reading and filing said petition, assignment of errors and bond, and during the same term of court at which said orders were made and entered and said judgment was rendered and entered; and on motion of Brown, Carlisle & Hugo, plaintiff's attorneys,

It is ordered and considered by the Court that said writ of error to the Supreme Court of the United States, from said orders and said

final judgment dismissing said suit for want of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiff, solely upon the question of the jurisdiction of the Court as prayed for in said petition, to review the question of jurisdiction of the Court in said petition mentioned, which is the only question arising herein.

Enter.

Dated the 15th day of November, 1904.

By the Court,
GEO. W. RAY,
*U. S. Judge.*"

(Printed Record, pp. 113, 114.)

No further certificate concerning the question of the jurisdiction of the Court below in issue is necessary.

*Excelsior Wooden Pipe Company vs. Pacific Bridge Company,* 185 U. S., 282-284;

*In re Lehigh Mining & Manufacturing Company, Petitioner,* 156 U. S., 322-325-327;

*Huntington vs. Laidley,* 176 U. S., 668-673-674-675-676-677;

*Interior Construction & Imp. Company vs. Gibney,* 160 U. S., 217-219.

*Shields vs. Coleman,* 157 U. S., 168, 175, 176.

The similarity of the order allowing the writ of error in the case at bar and the order in the above cited case, reported in 156 U. S. 325, and the similarity of the petition, and the order in the case at bar and in the case in 157 U. S. 168-175, will be observed. The similarity of the judgment and of the

order allowing the writ of error in the case at bar, and the decree and order in the above cited case in 185 U. S., 282-284, and the similarity of the judgment, petition and order in the case at bar and in the case in 176 U. S., 668-673 to 677 will also be noted.

> "A judgment of the Circuit Court of the United States, against a party contending that that Court has no jurisdiction because the case has not been duly removed from a State Court, may be reviewed as to the question of jurisdiction by this Court upon writ of error directly to that court under the act of March 3, 1891, c. 517, Sec. 5." (Headnote.)
>
> *Powers vs. Chesapeake & Ohio Ry. Co.*, 169 U. S., 92.

The decision of the question of whether or not the Court acquired jurisdiction by a proper service of process, may be reviewed by this Court upon writ of error directly to the Circuit Court.

*Shepard vs. Adams*, 168 U. S., 618-622.

## II.

## WAIVER AND ESTOPPEL.

(FIRST GROUND OF MOTION TO REMAND, PRINTED RECORD, P. 95.)

The defendant waived, and is estopped from asserting, any right it may have had to remove this suit from the State Court to the Circuit Court of the United States, by obtaining from the State Court, on October 24th, 1903, *and after the defendant's attorneys had full and positive information of the amount of the judgment demanded by the plaintiff in the complaint*, (which information was

derived from the plaintiff's affidavit filed October 19, 1903, *and served on defendant's attorneys October 23, 1903*) the order staying all proceedings in the action on the part of the plaintiff, except the taking of plaintiff's deposition on November 2, 1903, pending the appeal that had been taken by the defendant from the order entered October 2, 1903, denying defendant's motion to set aside the service of the summons, and until ten days after the decision of such appeal, which order was entered October 26, 1903. (Printed Record, pp. 24-71.)

*Manning vs. Amy*, 140 U. S., 137-138-140-141;

*Hanover Nat'l Bank vs. Benjamin Smith* (C. C. S. D. New York—Opinion by Johnson, J.) 13 Blatchford's C. C. Reports, 224-226;

*Case vs. Olney* (C. C. S. D. Cal. Opinion by Wellborn, J.) 106 Fed. Rep., 433;

*Chicago I. & N. P. R. Co. vs. Minn. & N. W. R. Co.* (C. C. N. D., Iowa. Opinion by Shiras, J.) 29 Fed. Rep., 337-339-340;

*State of West Virginia vs. King* (C. C. S. D., West Virginia. Opinion by Goff, C. J.) 112 Fed. Rep., 369-370-371;

*Hudson River Railroad & Terminal Co. vs. Day*, (C. C. Dist. of N. J.) 54 Fed. Rep., 545;

*Hulbert vs. Russo*, (C. C. S. D. of N. Y. Opinion by Lacombe, C. J.) 64 Fed. Rep. 8;

The defendant's attorneys formed the intention to remove the suit to the Circuit Court of the

United States on or prior to October 22, 1903. The bond for such removal is dated on that day, (Printed Record, p. 4) and Mr. Purcell's affidavit says that he was informally advised on that day that the case would probably involve more than two thousand dollars and obtained the bond out of abundant precaution. (Printed Record, p. 102.)

Notwithstanding such intention, the defendant's attorneys procured from the State Court the order staying proceedings on October 24, 1903, upon the affidavit of Thomas Burns, one of such attorneys, verified October 16, 1903, in which, among other things, he said:

> "that on the 2nd day of October, 1903, an order was entered in this action at a special term of this court, denying a motion made by the defendant, appearing specially as aforesaid, to set aside the service of the summons herein, which was served without a complaint or notice, as deponent is informed and believes, on or about April 10th, 1903; that no complaint has been served or filed herein, as deponent is informed and believes; that on October 15, 1903, the defendant, through its said attorneys, appearing specially as aforesaid, served and filed a notice of appeal from said order to the Appellate Division of this court, Fourth Department, and has duly perfected said appeal from said order, and intends in good faith to prosecute the same, and that said defendant will suffer serious inconvenience and loss if proceedings under the said order are not stayed until the decision of the appeal, as plaintiff might make application to this Court for judgment herein." (Printed Record, pp. 25-26.)

It is true that defendant's attorneys may have formed and probably did form, the intention to remove the cause to the Federal Court, after this

affidavit was verified and after it was served on October 16, 1903, with notice of the motion for a stay to be heard October 24, 1903. *The essential fact is that the defendant presented this affidavit to the Court on October 24, 1903, and obtained the order staying proceedings from the Court on it on that day.* By presenting the affidavit to the Court on that day, the defendant on that day acted upon and reasserted to the Court the statements therein contained and represented to the Court that the facts stated in the affidavit continued to exist as they did on October 16, 1903, when the affidavit was verified; it was an assertion to the Court that on October 24, 1903, the defendant still intended to prosecute the appeal to the Appellate Division of the Supreme Court, Fourth Department, in good faith; it was an assertion and representation to the Court that on the 24th day of October, 1903, there was still danger that the defendant would suffer serious inconvenience and loss if proceedings under said order were not stayed, until the decision of the appeal, as plaintiff might apply to the State Court for judgment.

If the case was to be removed to the United States Court, there was no intention on the part of the defendant to prosecute the appeal to the Appellate Division of the State Court and defendant could not suffer any inconvenience or loss, if proceedings under said order were not stayed until the decision of the appeal, for if the case should be properly removed, the State Courts would thereby lose all jurisdiction to render judgment, hear the appeal or take any proceedings in the case. The order obtained is even broader than the affidavit, for it stays, not only proceedings under the order

appealed from, *but all proceedings* on the part of plaintiff, except the taking of the plaintiff's deposition, not until the decision of the appeal, *but until ten days thereafter.*

The defendant admits and shows, by the affidavit of one of its attorneys, that such attorney was informally advised, but not by the record, that the case would probably involve more than two thousand dollars, on October 22, 1903, the day the bond for removal was executed, and that on October 23, 1903, a copy of the plaintiff's affidavit, stating that the action was brought to recover $414,492.64, was served upon the defendant's attorneys with a copy of the order of the County Judge of Jefferson County for the taking of plaintiff's examination before trial. (Henry Purcell's affidavit, Bill of Exceptions, Printed Record, p. 102.)

Nevertheless, on the next day, *with full knowledge of all the facts*, the defendant's attorneys made the representations to the Court contained in the affidavit of Mr. Burns, and obtained the order staying proceedings. Of course, the Court would not have made this order, if the defendant's attorneys had informed it that they did *not* intend to prosecute the appeal to the Appellate Division in good faith, but did intend to remove the cause to the United States Court forthwith and had already procured a bond for that purpose.

If circumstances had arisen, after the making of the affidavit of Mr. Burns and the service of the notice of the motion based thereon, by reason of which the defendant did not intend to prosecute the appeal and did intend to remove the case to the United States Court, the defendant was in duty bound to withdraw or abandon its motion or to pre-

sent another affidavit stating the change of intention. This was a duty the defendant owed both to the Court and to the plaintiff.

The entire order of October 24, 1903, is made upon the theory that the cause was to proceed in the State Court.

The taking of the plaintiff's deposition had been set for November 2, 1903, by the order of the County Judge. If the cause was not to remain in the State Court, the putting of the clause in the order of October 24, excepting the taking of this deposition from the stay, was a *farce*, for the deposition proceedings would immediately go down, if the cause should be properly removed, for the State Court would immediately lose jurisdiction of the case.

Mr. Purcell states in his affidavit that the plaintiff's attorneys approved the order of October 24, 1903, in writing, upon the face thereof. It is true that the following appears at the foot of this order: "Approved, P. W. & B., B. C. & H." (Printed Record, p. 24) and that these are the initials of the attorneys for the respective parties.

It also appears in the order that it was made "after hearing Purcell, Walker & Burns in support of said motion, and Brown, Carlisle & Hugo, attorneys for plaintiff, *opposed*."

If the word "*approved*" with the initials of the attorneys of the respective parties is to be construed as a stipulation that the order be granted, rather than as an approval of the form of the order, after the court had announced the decision on the motion, the situation of the defendant is not improved in the least.

The order recites that it is made upon the said

affidavit of Thomas Burns. If not a representation to the Court, the taking of this order on the affidavit was a representation to the attorneys for the plaintiff that the facts stated in that affidavit continued to exist at the date of the order as they did at the time the affidavit was verified. The order and the approval were upon the representation, understanding and theory that the action was to remain in the State Court. If the initials of the attorneys for each party with and after the word "Approved" are to be considered as a stipulation that the order be granted, as implied in Mr. Purcell's affidavit, the taking of plaintiff's deposition, on November 2, 1903, in accordance with the order of the County Judge, being excepted from the stay, the stipulation was in effect a stipulation that such deposition could be taken on that day. If such was the stipulation, the filing of the petition for the purpose of removing the action from the jurisdiction of the State Court to the jurisdiction of the United States Court, on October 26th, 1903, was a violation of such stipulation.

In *Case vs. Olney*, 106 Fed. R., 433 (C. C. S. D. Cal. Opin. by Wellborn, J.) the Court held that the filing of a demurrer and the making of the following stipulation signed by the attorneys for the respective parties were a waiver of the right to remove the cause to the United States Court, to wit:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled cause that the issue raised by the above demurrer shall not be called for hearing by the attorneys for either party to said cause, except upon one week's notice in writing to the adverse attorneys; and it is further agreed that the attorneys for the

plaintiff will not notice said issue for hearing before ninety days from this date.

Dated this 15th day of March, 1900."

In *Hulbert vs. Russo*, 64 Fed. R., 8 (decided by the Circuit Court, S. D. New York. Opinion by Lacombe, Circuit Judge), the Court said:

"He (the defendant) has done nothing in the State Court whereby he has secured some benefit which would estop him from repudiating his former action, as did the defendant in *Bank vs. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035."

In *Hanover Nat. Bank vs. Benjamin Smith*, Impleaded, etc. (C. C. S. D. New York. Opinion by Johnson, J.) 13 Blatchford's C. C. Reports, 224-226, the Court said:

"The case was called for trial, and might, in the ordinary course, have been tried, when the defendant applied for a postponement. This was refused by the Court, except upon terms of the defendant's consenting to a reference. This he, in the first instance, refused to do; but afterwards, and before the trial was actually commenced, he consented to the reference of the cause for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. Under these circumstances, the defendant ought to be considered as estopped from making an application to remove the cause. The case is not, in my judgment, within the meaning of the statute. Its language is general, but the right it gives is the right of the party concerned, and he may waive it. It is to be construed as if the right to waive its benefit were expressed in the statute. The defendant was in time to apply for a removal when his case was called for trial, but his consenting to a reference, under the circumstances as shown, ought, in justice, and does, I think, in law, preclude him from a

subsequent application to remove the cause. To hold otherwise would recognize a consent to a reference as an allowable resort to gain the postponement of a cause, and the consequent extension of the time limited for its removal into the Circuit Court.

The motion to remand the cause to the Supreme Court of the State of New York must be granted."

The taking of the order staying proceedings on October 24, 1903, on said affidavit of Thomas Burns, was an assertion by the defendant's attorneys to the Court and to the plaintiff's attorneys that they did not intend to abandon the appeal that had been taken to the Appellate Division, of the Court, but that they still intended "in good faith to prosecute the same."

In *Chicago I. & N. P. R. Co. vs. Minn. & N. W. R. Co.*, 29 Fed. R., 337, 339, 340 (C. C. N. Dist. Iowa. Opinion by Shiras, J.) the Court said:

"Furthermore, it appears from the record in this cause that, upon the decision on the application for the writ of injunction, the defendant took an appeal thereon to the Supreme Court of the State, and filed a *supersedeas* bond, and has thus carried the question whether the petition on its face shows facts authorizing the issuance of a writ of injunction into the Supreme Court. After this action on part of defendant, and without withdrawing or abandoning the appeal, the defendant, by filing a petition for removal in the District Court, claims that the jurisdiction of the State Court is ended. The defendant, by its own act, invoked the jurisdiction of the State Supreme Court; and, if I understand the position of counsel, it is claimed that defendant may still prosecute the appeal before the State Supreme Court, for the purpose of reversing the ruling authorizing the issuance of the writ of injunction, and at the same time

> may have the case pending in this court, to be proceeded with as though such appeal had not been taken. In effect the case would, in such event, be pending in two courts at one and the same time. This is not permissible. The cause must be wholly in one court or in the other. It cannot be split up into parts. To be removable, the case, as an entirety, must be brought into this court. By its own act, the defendant had, before petitioning for removal, carried, by appeal, the case into the Supreme Court, and no action has been taken which has lawfully terminated the jurisdiction of that Court. Under these circumstances, it must be held that the right of removal did not exist when the petition for removal was filed, and that the filing thereof in the District Court could not have the effect of terminating the jurisdiction of the Supreme Court of the state over the case."

In *Hudson River Railroad & Terminal Co. vs. Day*, 54 Fed. R., 545 (C. C. Dist. of N. J., Opinion by Green, J.), the Court held that a landowner who had appealed to a state court from the decision in condemnation proceedings against him waived his right of removal to the Federal Court by having the record of prior proceedings sent up on certiorari for review by the State Supreme Court.

In *Manning vs. Amy*, 140 U. S., 137-138-140-141, the Court said:

> "On the 29th day of December, 1884, the last day of the October term of the court, Manning filed what purported to be a petition and bond for the removal of the cause to the United States Circuit Court for the District of Massachusetts, and he also, simultaneously and in connection therewith, filed the following motion:
>
> 'Defendant's motion touching the removal of this action.
>
> "And now comes the defendant specially

and suggests to the Court that he has heretofore filed a motion to dismiss this action for causes therein set forth, and also a plea in abatement for causes therein set forth, but neither said motion nor said plea has yet been heard or determined by this Court, and the Court is about to adjourn without day.

He also suggests that he has herewith filed a petition for the removal of this cause to the Circuit Court of the United States for the District of Massachusetts, together with a suitable bond therefor, but that he has filed the same without prejudice to said motion or said plea.

Wherefore, in case said motion should not be allowed and in case said plea should not be sustained, he prays the Court to order the removal of this action, as prayed for in said petition.

JEROME F. MANNING,
By his Atty., Wilbur H. Powers.'

"No question is made as to the diverse citizenship of the parties, nor can it admit of a doubt that the application for removal, if it can be properly called such, was, when first filed, made at the proper time. If, therefore, the petition and bond had been in due form, and had been unaccompanied by the motion filed simultaneously with them, and as a part of them, it is equally clear that the removal to the Federal Court would have been properly effected.

* * * * * * * * * *

"We do not deem it necessary to pass upon these defects of the petition and the bond, for it is clear to our minds that, with the accompanying motion, they do not constitute a valid application for removal, as contemplated by the statute. Indeed, the proceeding was not even in intent an application for removal to take effect on the date of its filing. The petition, read and construed, as it must be, with the accompanying motion, asks not for a removal, but for the judgment of the court on a motion and a plea in abatement which, if ren-

dered as asked for, would have made a removal unnecessary and impossible. In any view, it was a mere conditional application for removal in case the court, after consideration of the motion to dismiss and the plea in abatement, should overrule both.

"The record recites that after the motion touching the removal of the case was filed with the petition and bond for removal, 'thence the same was continued *nisi* to the January term, 1885, the defendant *reserving* his *right* to remove to the Circuit Court of the United States as aforesaid,' the continuance being manifestly ordered for the purpose of an opportunity to hear and determine the said motion and plea. The avowed purpose of the defendant in the proceedings was to have the state court retain jurisdiction for the purpose of getting a judgment in his favor, and not to have the case removed unless the judgment went against him. It is clear that Congress did not, by the act of March 3, 1875, intend to allow the defendant 'to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take his suit to another tribunal.' (Removal Cases, 100 U. S., 457, 473.) Such a proceeding was not authorized by that act. We hold, therefore, that the proceedings in the state court on the 29th of December, 1884, did not have the effect to remove the cause to the Federal Court."

The similarity between the above case and the case at bar is very close, in that almost simultaneously with the filing of the petition and bond for removal and after the bond had been executed, the defendant in the case at bar represented to the court and to plaintiff's attorneys, that it intended to prosecute the appeal to the appellate division in good faith, and obtained the order staying proceedings on that ground. But the plaintiff's position in the case at bar is stronger than in the above

case: (1) for the reason that in the above cited case the defendant did not conceal from the court and the opposing counsel the fact that it intended to remove the cause to the United States court, but informed them of such fact; while in the case at bar the fact that the defendant intended to remove the cause was concealed; (2) because in the above case no action was secured from the state court beneficial to the defendant upon the theory that the action was to remain in the state court, while in the case at bar such beneficial action was secured, to-wit: the order staying proceedings on the part of the plaintiff until ten days after the decision of the appeal which had been taken to the Appellate Division.

The defendant's attorneys entered the order, staying proceedings pending, and until ten days after the decision of the appeal, that had been taken to the Appellate Division of the State Court, on the same day and probably at the same time, that they filed the petition for removal. These acts were absolutely inconsistent with each other. Having elected to remain in the State Court by obtaining the said order staying proceedings, the defendant was bound by such election.

## III.

## LACHES IN FILING PETITION FOR REMOVAL.

(SECOND GROUND OF MOTION TO REMAND. PRINTED RECORD, P. 96. FIRST OBJECTION TO MOTION TO SET ASIDE SERVICE OF SUMMONS, PRINTED RECORD, P. 97.)

The petition for removal was filed in the State Court too late to effect a removal of the suit to the Circuit Court of the United States.

The removal act provides that the petition for removal must be filed in the State Court "at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." (Act Aug. 13, 1888, c. 866, Sec. 3.)

In New York, the time, within which the defendant is required to answer or plead to the complaint of the plaintiff, is regulated by the Code of Civil Procedure. The following are sections of this code:

"Sec. 418. (Am'd 1877.) Form of Summons.

"The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

'To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment

will be taken against you by default, for the relief demanded in the complaint.

Dated .....

"The summons is deemed the mandate of the Court."

"Sec. 419. (Amended 1879.) Service of copy complaint or notice with summons; consequence of failure.

"A copy of the complaint may be served with the summons. If a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default without application to the Court, unless either the defendant appears, or by a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in the next section."

"Sec. 421. Appearance of defendant.

"The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in Sec. 417 of this act, concerning the office address of the plaintiff's attorney."

In *Valentine vs. Myers' Sanitary Depot*, 36 Hun., 201, the General Term of the Supreme Court of New York, Second Department, held that a motion made by the defendant to make the complaint more definite and certain was not equivalent to an appearance. In the opinion the Court said:

"Before the present Code a notice of motion was held in many cases to be an appearance. * * * The Code (Sec. 421) now provides that an appearance *'must be made'* by notice of appearance, copy demurrer or copy answer."

In Wood vs. Furtick (Supreme Court, Appel-

late Term, First Department), 40 N. Y,. Supp. 687-689, the Court said:

> "We are of the opinion that the service of the defendant's notice of motion to vacate the service of the attachment, and the attempted levy thereunder, did not constitute a general appearance in the action. We are referred by the counsel for the plaintiff to a number of cases, neither of controlling authority, which are to the effect that service of a notice of motion which does not expressly qualify the party's appearance, is equivalent to a general appearance in the action. The cases alluded to, however, are such as arose before the present Code of Civil Procedure, and such as followed them without notice of the effect wrought by the Code. It is now provided that, if the defendant wishes to appear in the action, he must serve either an express notice of his appearance or a demurrer or answer. Code Civil Procedure, Sec. 421. The better opinion seems to be that a general appearance cannot now be effected in any other way.
>
> *Couch vs. Mulhane*, 63 How. Pr., 79.
>
> *Benedick vs. Arnoux*, 38 N. Y. Supp., 882."
>
> S. C. 17 Misc., 561.

If the above authorities, construing Sec. 421, are not "good law," the defendant has done several things in the action which constitute a general appearance. These acts of the defendant are specified in the 17th, 18th, 19th, 20th, 21st and 22nd assignments of error. If this Court should disagree with the above cases, in construing Sec. 421, we urge these six assignments of error upon the consideration of the Court. What, in that event, would be the result so far as the question whether the defendant made a general appearance is concerned, is discussed in Point X of this Brief. If this Court agrees with the cases cited, construing

Sec. 421, then, of course, the above mentioned six assignments of error are not well taken.

The following are sections of said Code of Civil Procedure:

"Sec. 422. (Amended 1877.) When defendant must answer before time to appear expires.

"A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer, upon the plaintiff's attorney, before the expiration of the time within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in Sec. 479 of this act."

"Sec. 479. (Amended 1877.) Copy complaint, when to be served.

"If a copy of the complaint is not delivered to a defendant, at the time of the delivery of a copy of the summons to him, either within or without the State, his attorney may, at any time within twenty days after the service of the summons is complete, serve upon the plaintiff's attorney a written demand of a copy of the complaint, which must be served within twenty days thereafter. The demand may be incorporated into the notice of appearance. But where the same attorney appears for two or more defendants, only one copy of the complaint need be served upon him; and if, after service of a copy of the complaint upon him, as attorney for a defendant, he appears for another defendant, the last defendant must answer the complaint within twenty days after he appears in the action."

"Sec. 480. Consequence of failure.

"If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in the last section, the defendant may apply to the Court for a dismissal of the complaint."

It will be noted that Sec. 479 says:

> "*The demand* (for a copy of the complaint) *may be incorporated into the notice of appearance.*"

This permission indicates that it was the intention of the Legislature that this demand could be made without making an appearance in the case. When this section is read in connection with the above authorities construing the above quoted Sec. 421, which says:

> "The defendant's appearance *must be made by serving* upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, *a notice of appearance or a copy of a demurrer or of an answer,*"

it is clear that the defendant could have demanded a copy of the complaint without appearing in the case. If the defendant had done this, it would have been in precisely the same position it would have occupied if the complaint had been served with the summons, and within twenty days after the service of the complaint, in compliance with the demand, could have filed its petition for a removal of the suit to the Federal Court.

It is evident that the law was framed with just such a case as the one at bar in view, and to put a defendant, who is served with a summons without a complaint, in exactly the same position, with the same privileges and advantages, as if the complaint had been served with the summons; the defendant failed to avail itself of the right, given it by the statute, to know what was in the complaint and the amount of the plaintiff's demand, without making a general appearance. The fact that the defendant failed to avail itself of its statutory rights and

failed to demand a copy of the complaint and allowed the statutory time for so doing to go by, and the right of the plaintiff to enter judgment to accrue, cannot operate to extend the time for filing the petition for removal, until defendant's attorneys accidentally learn the amount of the judgment demanded in the complaint. The removal act does not say that the defendant may file the petition at the time, or within a certain time after he or his attorneys learn the amount in dispute, but says the petition must be filed at the time or before the time the defendant is required to answer or plead to the declaration or complaint of the plaintiff. He certainly has no right to answer or plead after the plaintiff's right to enter judgment has accrued.

Section 520 of the said Code reads as follows:

> "Sec. 520. Pleadings to be subscribed; within what time to be served.
>
> "A pleading must be subscribed by the attorney for the party. A copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading."

In addition to the above quoted Sec. 419, the following sections of the Code relate to the entry of judgment by default, where the summons is personally served:

> "Sec. 420. (Amended 1877.)
>
> "Judgment may be taken without application to the Court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or

implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case where the breach of the contract, set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit."

"Sec. 1212. (Amended 1879.) Judgment by default in certain actions on contract; how taken.

"In an action specified in section four hundred and twenty of this act, where the summons was personally served upon the defendant, and the copy of the complaint, or a notice stating the sum of money for which judgment will be taken, was served with the summons, or where the defendant has appeared, but has made default in pleading, the plaintiff may take judgment by default, as follows:

"1. If the defendant has made default in appearing, the plaintiff must file proof of the service of the summons, and of a copy of the complaint or the notice; and also proof, by affidavit, that the defendant has not appeared. Whereupon the clerk must enter final judgment in his favor.

"2. If the defendant had seasonably appeared, but has made default in pleading, the plaintiff must file proof of the service of the summons, and of the appearance or of the appearance only; and also proof, by affidavit, of of the default. Whereupon the clerk must enter final judgment in his favor.

"If the defendant has made default in appearing or pleading, and the case is not one where the clerk can enter final judgment, as prescribed, in either of the foregoing subdivisions of this section, the plaintiff must apply to the court for judgment, as prescribed in Sec. 1214 of this act."

"Sec. 1213. Amount of judgment in such cases; how determined.

"Where final judgment may be entered by the clerk, as prescribed in the last section, the amount thereof must be determined as follows:

"1. If the complaint is verified, the judgment must be entered for the sum for which the complaint demands judgment; or, at the plaintiff's option, for a smaller sum; and if a computation of interest is necessary, it may be made by the clerk.

"2. If the complaint is not verified, the clerk must assess the amount due to the plaintiff, by computing the sum due upon an instrument for the payment of money only, the nonpayment of which constitutes a cause of action, stated in the complaint; and by ascertaining, by the examination of the plaintiff, upon oath, or by other competent proof, the amount due to him for any other cause of action stated in the complaint. If an instrument, specified in this subdivision, has been lost, so that it cannot be produced to the clerk, he must take proof of its loss and of its contents. Either party may require the clerk to reduce to writing and file the assessment, and the oral proof, if any, taken thereupon."

"Sec. 1214. (Amended 1877, 1900.) Application to Court for judgment by default; when necessary.

"Where the summons was personally served upon the defendant, within the State, and he has made default in appearing, or where the defendant has appeared, but has made default in pleading; and the case is not one where the clerk can enter final judgment, as prescribed in the last two sections, the plaintiff may apply to the Court, or to a judge or justice thereof out of court, for judgment. Upon the application he must file, if the default was in appearing, proof of service of the summons; or, if the default was in pleading, proof of appearance, and also, if a copy of the com-

plaint was demanded, proof of service thereof, upon the defendant's attorney; and in either case, proof by affidavit, of the default which entitles him to judgment. If one or more of the defendants have appeared, and one or more defendants have failed to appear, then the application for judgment must be made to the Court, unless the defendants who have appeared consent to the making of such application to a judge or justice out of court."

"Sec. 1215. (Amended 1877, 1901.) Proceedings on such an application.

"The Court, or a judge or justice thereof, must thereupon render the judgment to which the plaintiff is entitled. It, or they, may, without a jury, or with a jury if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it, or them, to render the judgment, or to carry it into effect; or it, or they, may in its, or their, discretion, direct a reference, or a writ of inquiry, for either purpose; except that where the action is brought to recover damages for a personal injury or an injury to property, the damages must be ascertained by means of a writ of inquiry. Where a reference or writ of inquiry is directed, the Court, or a judge or justice thereof, may direct that the report or inquisition be returned to the court, or a judge or justice thereof, for its, or their, further action; or it, or they, may in its, or their, discretion, except where special provision is otherwise made by law, omit that direction; in which case final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages, ascertained by the inquisition, without any further application."

Under these sections, if there had been no stipulation extending defendant's time to appear, the plaintiff could have applied to the court or to a justice thereof on the 1st day of May, 1903, for judgment. But the first stipulation gave the de-

fendant twenty days additional time to appear, generally or specially. This extended the time to appear to and including the 20th day of May, 1903. The next stipulation is dated May 23, 1903. Hence, the defendant was in default on the 21st and 22nd days of May, 1903, and the plaintiff could have applied to the court or a justice thereof for judgment on those days. The stipulation dated May 23, 1903, extended the defendant's time to appear, generally, until ten days after the hearing and decision of the motion made by the defendant to set aside the service of the summons. The order, deciding this motion, was made and dated September 28, 1903, and entered October 2, 1903, and a copy with notice of such entry was served the same day. (Printed Record, p. 102.) Hence, the stipulation dated May 23, 1903, expired *at the latest* on October 12, 1903, and between that date and the making of the order staying proceedings on the part of the plaintiff on October 24, 1903, the plaintiff could have applied to the court or a judge for judgment; and the defendant has been in default ever since the expiration of the second stipulation.

The pendency of the motion to set aside the service of the summons did not have the effect to extend the time to appear or answer.

> *Wedekind vs. Southern Pacific Company*, 36 Fed. Rep., 279-280.
>
> *Olds vs. City Trust, Safe Deposit and Surety Co.*, (C. C. Dist. of Mass. Opinion by Lowell, J.) 114 Fed. Rep., 975.

The order, granted October 24, 1903, did not extend the time to answer. It contained a stay of proceedings pending the appeal and until ten days

after the decision thereof. But a stay of proceedings under the Code does not operate to extend the time for pleading.

*Platt vs. Townsend* (Gen. Term, Dec.), 3 Abb. Pr., 9.

*Sniffen vs. Peck*, 6 N. Y. Civ. Pro. R., 188.

*McGowan vs. Leavenworth*, 2 E. D. Smith, 24.

In *Platt vs. Townsend, supra,* an order for a bill of particulars had been obtained accompanied by a stay of proceedings, but without an extension of time to plead.

The order granted October 24, 1903, contains these words:

"That the defendant be relieved from any default in appearing herein."

It will be noted that this does not relieve from default *in answering.* We are at a loss to know what the person, who drew the order, expected to accomplish by the insertion of these words in the order. They would not prevent the entry of judgment without an extension of the time to appear or answer. The stay granted by the order accomplished the purpose of preventing entry of judgment. These words did not extend the defendant's time to appear or answer, and the Court could not extend the time to answer, for the defendant had not complied with Rule 24 on that subject, set forth in Mr. Carlisle's affidavit. (Printed Record, p. 99.) The only explanation of these words which occurs to us, is that the attorney who drew the order, having the secret intention of filing the petition for removal immediately after the entry of the order, and having already procured the execution of the bond for that purpose, had an idea

that these words in the order would restore the right to file the petition for removal, which the defendant had lost by its default; but the Court granting the order could have had no intention of restoring such right, for the order was made upon the theory that the action was to remain in the State Court, and upon an affidavit stating that the defendant intended to prosecute the appeal, it had taken to the Appellate Division of that court, in good faith.

But, if the Court had made an order expressly restoring to the defendant the right to file the petition for removal, such order would have been beyond its power. Neither the State nor Federal Court has power to restore such right, lost by lapse of time, any more than it has power to restore a right to appeal which has lapsed.

Mr. Purcell says in his affidavit:

> "Deponent further says that on June 25 he was suddenly taken ill, left his office, and on account of such illness, did not return to it and was not able to return to it until October 15, 1903. * * * * That on October 15, defendant filed and served notice of appeal from the order denying the said motion, and on that day deponent discovered that the defendant was in default in appearing. That this was due entirely to deponent's illness." (Bill of Exceptions, Printed Record, pp. 101-102.)

This illness might have been such an excuse that the Court, in its discretion, would open the default and allow the defendant to appear and answer, but the time within which a petition for removal may be filed is not a matter of discretion; it is a matter of strict legal right, over which the Court has no control.

Mr. Purcell's illness was no more an excuse which would extend the time for filing the petition, than the snowstorm which blocked a train and prevented an attorney from filing a petition for removal in time, was such an excuse, in

*Daugherty vs. Western Union Tel. Co.*, 61 Fed. Rep., 138.

In *Kansas City, &c., Railroad Company vs. Daugherty*, 138 U. S., 298-303, the Court said:

> "The statute is imperative that the application to remove must be made when the plea is due, and because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal."

As we have shown, the defendant, before the petition for removal was filed, was in default, with or without the stipulations.

The obtaining of the order of October 24, 1903, by the defendant, relieving it from its default, was an acknowledgment on its part that it was in default. This order, as we have shown, contained no extension of time to appear or answer. Consequently the defendant was in default on October 26, 1903, when the petition for removal was filed.

Although the State Court was clothed with power to open the default and allow the defendant to appear or answer, the opening of the default, if granted, could not restore the defendant's right, once lost, to file the petition for removal.

*Price vs. Lehigh Val. R. Co.* (C. C. Nor. D. of N. Y.), 65 Fed. Rep., 825-826. (Opinion by Coxe, J.)

*Rock Island Nat. Bank vs. J. S. Keator Lumber Co.* (C. C. Nor. D. of Ill.) 52 Fed. R., 897. (Opinion by Blodgett, J.)

*Hurd vs. Gere* (C. C. Nor. D. of N. Y.) 38 Fed. R., 537 (Opinion by Wallace, J.)

*Austin vs. Gagan,* 39 Fed. R., 626-628. (C. C. Nor. D. of Cal. Opinion by Sawyer, J.)

In *Price vs. Lehigh Val. R. Co.*, 65 Fed. R., 825-826, Judge Coxe said:

"When the defendant permitted the twenty days allowed by the New York Code of Civil Procedure to expire without legal extension, it lost the right to remove. The defendant was required 'by the laws of the State' to answer the complaint on or before October 19, 1894. Assuming that the language of the removal act 'or the rule of the State Court' (25 Stat., 433, 435) is applicable where the time to answer is fixed by the laws of the State, it does not aid the defendant. The time to answer was not extended by a rule of the State Court. It was extended pursuant to an understanding between the parties for their mutual convenience. Oral stipulations of this kind are not recognized. Rule 11, N. Y. Sup. Ct.; Leese vs. Schermerhorn, 3 How. Pr., 63; Broome vs. Wellington, 1 Sandf., 664. In legal contemplation it was as if a default existed after October 19, and, although the State Court was clothed with power to enlarge the time and even to open a default, and receive defendant's answer, it had no power to revive a right once lost by non-compliance with the statute. The removal on December 13 was too late. It was sanctioned neither by statute nor by rule. Doyle vs. Beaupre, 39 Fed., 289, and cases cited: Austin vs. Gagan, Id., 626; Dulbanco vs. Singletary, 40 Fed., 177; Velie vs. Accident Co., Id., 545; Daugherty vs. Telegraph Co., 61 Fed., 138; Spangler vs. Railroad Co., 42 Fed., 305; Bowers vs. Supreme Council, 45 Fed., 81. Remand granted."

In *Rock Island Nat. Bank vs. J. S. Keator Lumber Co.*, 52 Fed. R., 897-898, Judge Blodgett said:

> "These defendants, then, were in default, and had lost their right of removal on the 13th day of December, when the rule extending the time to plead was entered in pursuance of the stipulation of the complainant; and I cannot see how this stipulation, or the order of court made in pursuance thereof, can be construed to restore to the defendants the right of removal which they had lost. The complainant may have been entirely willing that these defendants should have the right to put in any defense which they might have had in the State Court, but a mere agreement to that effect is not and cannot, in justice, be held to waive or restore to the defendants the right of removal which they had lost. For these reasons the motion to remand is sustained, without considering or passing upon the question whether or not the case presents a separable cause of action which would entitle these defendants to remove the case."

In *Austin vs. Gagan*, 39 Fed. R., 626-628, the Court held that the Court cannot, by an order made after the time to answer has expired, directing the bond to be filled *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the State Court, which has already become vested and fixed under the statute.

In *Boers vs. Preston*, 111 U. S., 252-255, the Court said:

> "The courts of the Union being courts of limited jurisdiction, the presumption, in every stage of the cause, is, that it is without their jurisdiction unless the contrary appears of record. Grace vs. American Ins. Company., 109 U. S., 278-283; Robertson vs. Cease, 97 U. S., 646."

## IV.

## CASES, HOLDING A VOID SERVICE OF SUMMONS DOES NOT SET TIME RUNNING, NOT IN POINT.

In the Court below, the defendant cited the cases of *Cady vs. Associated Colonies*, 119 Fed. R., 420; *Donohue vs. Calumet Fire-Clay Co.*, 94 Fed. R., 23, and *Tortat vs. Hardin Mining and Manufacturing Co.*, 111 Fed. R., 426, in which it was held that an illegal and void service of a summons did not set the time mentioned in the Removal Act to running, and that in such a case the petition for removal may be filed at any time, and even after entry of judgment. Those cases are not in point in the case at bar, for the reason that in not one of them was there an adjudication in the State Court, at the time the petition for removal was filed, adjudging that the service of the summons was legal and valid.

*In the case at bar there was such an adjudication, made on defendant's motion, at the time the petition for removal was filed.*

The order of the State Court denying the ~~plaintiff's~~ defendant's motion to set aside the service of the summons has never been reversed or set aside.

*This decision of the State Court, whether right or wrong, is the law of the case, and was binding alike upon the defendant and the State and Federal Courts.*

*Duncan vs. Gegan*, 101 U. S., 810-812.

*Loomis vs. Carrington* (E. D. Mich. Opinion by Brown, J.), 18 Fed. R., 97-99.

*Bragdon vs. Perkins-Campbell Co.* (C. C. W. Dist. Pa. Opinion by Acheson, C. J.), 82 Fed. R., 338.

*Allmark vs. Platt S. S. Co.* (C. C. E. Dist. N. Y. Opinion by Benedict, J.), 76 Fed. R., 615.

*Davison vs. Shawmut Min. Co.* (C. C. W. Dist. N. Y.), 124 Fed. R., 860.

*Olds vs. City Trust, Safe Deposit and Surety Co. of Phila.* (C. C. Dist. Mass., Opinion by Lowell, J.), 114 Fed. R., 975.

*Brooks vs. Farwell* (C. C. Dist., Col.) 4 Fed. R., 166.

*Kidder vs. N. W. Mut. Life Ins. Co.*, 117 Fed. R., 997-998.

This question will be more fully discussed in Point IX of this Brief, in connection with a discussion concerning the power of the Circuit Court to review the order of the State Court or to make an order setting aside the service of the summons, while the order of the State Court denying a similar motion remained unreversed.

## V.

## WHEN DID THE CASE BECOME REMOVABLE?

Mr. Purcell, in his affidavit, says:

"Deponent further says that on or about October 19, 1903, the plaintiff applied *ex parte* upon the affidavits of the plaintiff, Hiram Remington, and others, to the County Judge of Jefferson County, for an order to examine the said plaintiff before trial, which was granted on that day by said Judge and there-

after and on October 23, 1903, copies of said affidavits and order were served on deponent's firm. That it was on the day last mentioned, to-wit: October 23, 1903, that it appeared for the first time from the papers or record in this action that the amount involved therein was two thousand dollars, exclusive of interest and costs, and this was shown and appears by a statement in said affidavit of Hiram Remington, when he states in substance that the action was brought to recover $414,492.64. That the case thereupon became a removable controversy." (Bill of Exceptions, Printed Record, p. 102.)

If it be true that a suit is not removable until some paper, disclosing the amount of the judgment demanded, is filed or served on the defendant, most default cases, in which the complaint was not served with the summons, do not become removable until judgment is entered, for the law does not require the filing of the complaint before the entry of judgment, and it is generally the practice not to file the complaint in such cases until judgment is entered.

Had the defendant filed the petition for removal within twenty days after the service of the summons in the case at bar, if the defendant's contention on this point is correct, the plaintiff could have had the case remanded to the State Court upon the ground that the petition was prematurely filed, and the case was not removable at that stage.

The Court, in *Coffin vs. Philadelphia W. & B. R. Co.* (C. C. S. Dist. N. Y. Opinion by Lacombe, C. J.), 118 Fed. R., 688, did not agree with the opinion expressed in Mr. Purcell's affidavit.

In that case, the summons *without complaint* was served September 3, 1902. On September 19,

the defendant removed the cause to the Circuit Court of the United States on its petition averring that the matter in dispute was in excess of $2,000. Thereafter, the complaint was served claiming damages in the sum of $2,000. This, if served with the summons, would not have been sufficient to give the U. S. Court jurisdiction, but the Circuit Court refused to remand the case on the authority of *Zinkeisen vs. Hufschmidt,* Fed. Cas. No. 18,214.

In the Coffin case, the Court held the cause removable before the service or filing of the complaint or any other paper disclosing the amount in controversy.

In the case of *Zinkeisen vs. Hufschmidt* (Case No. 18,214), 30 Fed. Cas., 933, the following appears:

> "This action was brought in the State Court to recover the value of a quantity of wheat. Upon the defendant's application, an order of removal to the Circuit Court of the United States was granted by Judge Small of the State Court. At the time he made the order, no pleading or writ was on file showing the amount in dispute, except the petition of the defendant, asking for the removal. After the order was granted, Zinkeisen & Co. filed a complaint in the State Court, alleging the cause of action and claiming damages in a stated sum. In that complaint they obtained an order from Judge Small to show cause why the order made by him, removing the cause into the Federal Court, should not be vacated and set aside. On hearing the order to show cause, Judge Small refused to vacate the order of removal. On the first day of the session of the United States Circuit Court after the order of removal, Hufschmidt brought into the Court a certified copy of the papers filed in the State Court, including the complaint filed after the order of removal was granted, and asked that

said papers might be filed and the cause docketed in that court. The motion was argued before one of the judges of the United States District Court, who denied it, holding that the complaint filed after the order of removal was conclusive as to the amount in dispute. A motion was then made before Drummond, District Judge, to vacate and set aside the order made by the district judge, and that the cause be docketed, and after argument the order was set aside and the plaintiffs required to file a declaration. This settles a question of practice which has perplexed the profession in the state, and also settles that when the plaintiff chooses to commence suit by summons, and not file either his summons or complaint, the defendant, in a proper case for removal, may enter an appearance and show by petition that a suit has been commenced, and the amount claimed exceeds $500, and tender a proper bond, and thus secure a removal of his cause into a federal court; and when he has done this, it is not in the power of the plaintiff to destroy that right by filing a complaint in the state court reducing his damages below $500; and that, when a cause is once properly in a federal court, the plaintiff cannot then file a declaration laying his damages at less than $500, and cut off the jurisdiction."

The case of *Beck & Pauli Lith. Co. vs. Wacker & Birk B. M. Co. et al.*, 76 Fed. R., 10, was removed to the United States Circuit Court before the complaint or any paper disclosing the amount claimed had been served or filed.

In the case at bar, the defendant had much more information concerning the nature of the controversy than the defendant in the cases cited appears to have had. The plaintiff's affidavits which were presented to the court on defendant's motion on June 9, 1903, disclosed fully the nature of the con-

troversy and stated that the plaintiff had *sustained damages in a large amount.*

The defendant in the case at bar could have filed a petition before the time it admits it became in default with as clear a conscience as the defendants in the above cases. The Removal Act does not require the petition to be verified.

> "It is settled beyond dispute that no verification is necessary to the sufficiency of the petition."
>
> *Osgood vs. Chicago, Etc. R. Co.*, 6 Biss. U. S., 330, 336.
>
> *Connor vs. Scott*, 4 Dill U. S., 243.
>
> *Allen vs. Ryersen*, 2 Dill U. S., 501.
>
> *Sweeney vs. Coffin*, 1 Dill U. S., 73.
>
> *Houser vs. Clayton*, 3 Woods U. S., 273.

THE POWERS CASE.

In the court below, the defendant placed great reliance upon the case of *Powers vs. Chesapeake & Ohio Ry. Co.*, 169 U. S., 92, and that case will undoubtedly be its main reliance is this court.

We are unable to discover any resemblance between the Powers case and the case at bar. But, if they were otherwise exact counterparts, the cases differ in one most important particular. In the Powers case the defendant had taken no step in defense of the action, in the state court, between the time the plaintiff dismissed the action as to the local defendants (which made the controversy removable), and the time of filing the petition for removal.

*In the case at bar, the defendant took a very important step in defense of the action, in the state court, between the service on the defendant's attor-*

*neys, on Oct. 23rd, 1903, of plaintiff's affidavit (which defendant claims first made the suit removable) and the filing of the petition for removal on October 26, 1903.*

*In the case at bar, on October 24, 1903, the defendant procured from the state court the order relieving it from its default in appearing and staying proceedings on the part of the plaintiff, thereby completely tying the plaintiff's hands, except in the matter of plaintiff's deposition, pending the appeal and until ten days after its decision; and the defendant caused the order to be entered October 26, 1903.*

In the Powers case, the court expressly bases the decision on the fact that the defendant had not taken any new steps in defense of the action between the time, when the action became removable, and the time the petition for removal was filed.

In the opinion the Court said:

> "For the reasons before stated, we are of the opinion that, upon the true construction of the act of Congress, the petition, filed as soon as the case became a removable one, *and before the railway company took any new steps in defense of the action, was seasonably filed.*" (Page 102).

The facts in the Powers case were very peculiar and the decision cannot be considered authority except in a case surrounded by the same peculiar circumstances. This Court refused to follow it in two cases differing but slightly from it. These cases are *Kansas Suburban Belt Ry. Co. vs. Herman,* 187 U. S., 63, and *Whitcomb vs. Smithson,* 175 U. S., 635, which were precisely similar to the Powers case, except that there had been no fraud in the joinder of the local defendants and the cases were

not voluntarily dismissed as to these defendants by the plaintiff, but were dismissed as to them by the Court on the trial. The Court held in the two cases cited that the defendant remaining, who was a non-resident, did not have the right to remove the action to the United States Court.

If the Powers case is to be followed literally, the last two cases cited became for the first time removable, and there first appeared "of record to be a removable controversy" in such cases upon the dismissal of the actions as to the local defendants on the trial and under the decision in the Powers case the remaining defendant would have had the right to then file its petition for removal.

In the above *Kansas City Suburban Belt Ry.* case, the petition alleged fraud in the joining of the two local defendants, and the Court intimates that, if this allegation had been proved, it would have followed the Powers case, notwithstanding the fact that the action was not voluntarily dismissed as to the local defendants but was dismissed as to them by the Court on the trial. The Court says:

> "But apart from this, the averments of fraud were specifically denied, and, so far as this record discloses, the petitioner, who had the affimative of the issue, failed to make out its case. *Plymouth Mining Company vs. Amador Canal Company,* 118 U. S., 264, 270.
>
> Doubtless the general rule is that issues of fact raised on petitions for removal should be tried in the Circuit Court of the United States, but petitioner did not file the record in the Circuit Court, and as the issue was correctly disposed of, it would be absurd to send the case back to be removed for the purpose of being remanded, and we are obliged to deal with the record as it is. Nor was the evidence introduced on plaintiff's behalf, and demurred to,

made part of the record, and the bare fact that the trial court held it insufficient to justify a verdict against the Terminal Company was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown that plaintiff had reasonable ground for a *bona fide* belief in the liability of both defendants. In these circumstances, the case comes within *Smithson vs. Whitcomb*, and the judgment must be affirmed" (pp. 70, 71.)

No claim of fraud committed by the plaintiff has been made in the case at bar, in the petition or otherwise. Neither is there any claim made that there has been any change in the amount demanded by the plaintiff since the service of the summons. The claim is simply made that *the defendant's attorneys* were ignorant of the amount of the plaintiff's demand, although the Code provided a way for them to learn the amount, without appearing, and although after the affidavits of the plaintiff were presented in court on June 9, 1903, they had every reason to believe that the amount was more than $2,000. After receiving the information they did on June 9, 1903, why did they not at once follow the practice laid down in *Coffin vs. Philadelphia W. & B. R. Co., supra*, and file the petition for removal? Evidently because they expected that after they had served additional affidavits, which the defendant was, on June 9th, granted leave to serve, the Court would decide the motion to set aside the service of the summons in defendant's favor, and were therefore willing to remain in the state court.

THE PETITION FOR REMOVAL INSUFFICIENT.

(PLAINTIFF'S FOURTH OBJECTION FILED NOVEMBER 10, 1903. BILL OF EXCEPTIONS. PRINTED RECORD, P. 97.)

The defendant does not state *in its petition* or elsewhere when it first learned that the matter in dispute was over $2,000, and does not *in the petition* or elsewhere state that it was at any time ignorant of the fact. The petition states that the action was brought on or about the 10th day of April, 1903, *but does not attempt to show why the petition for removal was not made until October* 26, 1903. (Printed Record, p. 2.)

The petition does say:

> "That the time has not yet arrived, at which the defendant is required by the laws of the state of New York, or the rules of the Supreme Court of the state of New York, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

But this was a mere conclusion of law. The petition should have set forth facts, if they existed, which taken in connection with the facts already on the record in the case would show the Court that the above conclusion of law was correct.

In the Powers case, so much relied upon by the defendant, the facts showing that the action had become for the first time removable at the time the petition was made, *were set forth in the petition.* The opinion says:

> "A petition for removal, when presented to the state court, becomes a part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the

right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case.

* * * * * * *

"In the case at bar, the second petition for removal, as presented to the state court, alleged that the petitioner was a citizen of the states of Virginia and West Virginia, only, that Evans and Hickey had been fraudulently and improperly joined as defendants for the purpose of defeating the petitioner's right of removal, that because of their joinder the case had been remanded to the state court, and that the action, having been discontinued against them, was now for the first time pending against the petitioner alone; and by the transcript, previously filed in the state court, of the record of the proceedings in the Circuit Court of the United States upon the first petition for removal, it appeared to have been admitted that the individual defendants were citizens of Kentucky.

"It was thus made to appear, on the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the Circuit Court of the United States and this petition was rightly permitted to be amended in that court" (pp. 101, 102.)

In *Kansas City Suburban Belt Ry. Co. vs. Herman,* 187 U. S., 63-70, the Court said:

"The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after plaintiff had introduced his evi-

dence, notwithstanding the averments in the first petition" (p. 70.)

The defendant has attempted to add certain facts to the petition by filing the affidavit of Mr. Purcell in the court below, which affidavit was made in the federal court after the record on removal had been filed; but the petition cannot be added to in this way. *All the jurisdictional facts must appear in the petition or in the record as it had been made in the state court before the filing of the petition, and cannot be shown by amendment in the Circuit Court of the United States.*

*Jackson vs. Allen*, 132 U. S., 27-34.

*Orchore vs. Ohio & Miss. Ry. Co.*, 131 U. S., 240.

*Cameron vs. Hodges*, 127 U. S., 322.

In the last case cited the defendant attempted to cure the defects by affidavits filed in the United States Court. It is held in this case that this court, of its own motion, uniformly takes the objection of want of jurisdiction of the Circuit Court. Under the above authorities the petition was clearly insufficient, and cannot be amended.

But if Mr. Purcell's affidavit be added to the petition, it fails to state that *the defendant* was ignorant of the amount in dispute at the time the summons was served or when *the defendant* first obtained information that the matter in dispute exceeded the sum of $2,000 exclusive of interest and costs.

He says that the affidavit of the plaintiff stating the amount was served on *his firm* on October 23, 1903, and that on October 22, 1903, *he* was informally advised that the case would probably involve

more than two thousand dollars. For aught that appears, he may have been thus advised *by the defendant* and the defendant may have known at the commencement of the action the amount in dispute. There is nowhere in the record any statement by anyone showing when *the defendant* first learned that the amount involved was over two thousand dollars. (See Mr. Purcell's Affidavit, Printed Record, p. 101.)

## VI.

## DEFENDANT IN DEFAULT. HENCE NO CONTROVERSY. HENCE ACTION NOT REMOVABLE.

In the case of *Berrian vs. Chetwood*, 9 Fed. R., 678 (Circuit Court, S. D. N. Y.), Blatchford, C. J., said:

> "Even conceding that there were proper written extensions of time to answer till November 1st, nothing that then or before or afterwards occurred in oral conversations between the attorneys amounted to a consent by the plaintiff's attorney to extend the time to answer beyond November 1st. So, on November 3rd, when the petition for removal was presented and the bond approved, the defendant's time to answer had expired, he was in default; and there was no controversy between him and the plaintiff, within the meaning of the statute, so as to make a case for removal.
>
> The motion to remand the cause is granted, with costs."

In *Bailey vs. American Cent. Ins. Co.*, 8 Fed. R., 686 (Circuit Court, D. Iowa, Opinion by McCrary, C. J.), the Court said:

> "If the defendant has made a default, or if, having appeared, he has admitted the justice

of the plaintiff's claim, in either case there is no controversy" (p. 687.)

There can be no doubt that, between the 8th day of October, 1903, and the 24th day of October, 1903, the plaintiff could have applied for judgment, for the stipulation giving additional time to appear generally expired on October 8, 1903. That is the reason Mr. Burns stated in his affidavit that the plaintiff might apply for judgment and the defendant made the motion for a stay pending the appeal.

After the order of October 24th, the plaintiff could not apply for judgment on account of the *stay;* but the defendant was just as much in *default* as before, no extension of time to appear or answer having been granted.

If the relief from default in appearing (not in answering) in this order amounted to anything, without an extension of time to appear or answer, it was only for an instant, and the next instant the defendant was again in default, so that whether this order went into effect on October 24th, when it was signed, or on October 26th, when it was entered, in either event, the defendant was in default, when its attorneys filed the petition for removal on October 26, 1903.

The defendant claimed in the court below that this order did not go into effect until it was entered on October 26th. If the plaintiff had acted on this theory and had applied for judgment between the time of the signing of the order on October 24th and the time of its entry on October 26th, the defendant would undoubtedly have claimed that the plaintiff and his attorneys were

in contempt of court for violating the stay of proceedings contained in the order.

There can be no doubt that this order went into effect the instant it was granted, on October 24, 1903.

*Robinson vs. Govers*, 138 N. Y., 425-428-429.

*Manchester vs. Herrington*, 10 N. Y., 164-169.

*May vs. Cooper*, 24 Hun., 7-9.

*McKee vs. Flaherty*, 1 Law Bull., 14.

Hence if the relief from default in appearing (not in answering) contained in the order of October 24, 1903, amounted to anything, there being in it no extension of time to appear or answer, such relief from default expired, *at the very latest*, at midnight, October 24, 1903, and the defendant was again in default when the petition for removal was filed on October 26, 1903.

## VII.

## SOME LEADING CASES.

The Removal Act requires the defendant to file the petition for removal in the state court at the time, or any time before the defendant is required to answer or plead to the declaration or complaint of the plaintiff. This court has construed this to mean *as soon as the defendant is required to make any defense whatever in the state court*, so that, if the case should be removed, the validity of all his defenses may be tried and determined in the Circuit Court of the United States, and, therefore, that a petition for removal filed after the time at which

he is required to plead to the jurisdiction of the court *or in abatement of the writ*, is too late.

*Martin vs. Baltimore & C. R. Co.*, 151 U. S., 673, 686.

*Goldey vs. Morning News*, 156 U. S., 518, 524.

*Wabash Western R. Co. vs. Brow*, 164 U. S., 271, 277, 278.

In *Goldey vs. Morning News*, 156 U. S., 524, 525, the defendant, a citizen of the state of Connecticut, was served with a summons in the state of New York. He did not, as in the case at bar, appear specially in the state court and move to have the service set aside, but on the 20th day after the service filed his petition for removal to the Circuit Court of the United States for the Eastern District of New York.

After the removal the defendant appeared specially in the Circuit Court of the United States and moved, upon affidavits, to set aside the service of the summons. In the opinion the Court said:

> "It has been held by this Court, upon full consideration, that the provision of this act, that the petition for removal shall be filed in the state court at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint,' requires the petition to be there filed at or before the time when the defendant is so required to file any kind of plea or answer, 'whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court *or in suspension or abatement of the particular suit*, or by plea in bar of the whole right of action,' because, as the Court said, 'Construing the provision now in question, having regard to the natural

meaning of its language and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court *as soon as the defendant was required to make any defense whatever in the court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States. Martin vs. Baltimore & Ohio Railroad,* 151 U. S., 673, 686, 687.

As the defendant's right of removal into the Circuit Court of the United States can only be exercised by filing the petition for removal in the state court before or at the time when he is required to plead in that court to the jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the state court, or the petition for removal is filed before that time in the state court, and the plea is seasonable filed in the Circuit Court of the United States after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States."

The Court in this case treated the motion to set aside the service of the summons as a plea in abatement.

In *Martin vs. Baltimore & Ohio Railroad,* 151 U. S., 673, 686, 687, the Court said:

"The defendant's petition for the removal of the case into the Circuit Court of the United States was not filed at the rules, either in March or April. But it was afterwards filed in and heard by the state court before the end of the April term. It was therefore filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the

jurisdiction of the court, *or in abatement of the writ.*

Was this a compliance with the provision of the act of Congress of 1887, which defines the time of filing a petition for removal in the state court? We are of opinion that it was not for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court to answer or plead to the declaration or complaint. These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of the law, by demurrer or in matter of fact, either by dilatory plea to the jurisdiction of the court *or in suspension or abatement of the particular suit* or by plea in bar of the whole right of action, *are said in the standard books on pleading to oppose or answer the declaration or complaint which the defendant is summoned to meet.*

"*Stephen on Pleading* (1st An. Ed.), 60, 62, 63, 70, 71, 239.

"*Lawson Pleading,* 36.

"The Judiciary act of September 24, 1789, Ch. 20, Sec. 12, requires a petition for removal of a case from a state court into the Circuit Court of the United States to be filed 'at the time of entering his appearance in such state court.' 1 Stat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Car Co. vs. Speck,* 113 U. S., 34; *Smith vs. Lyon,* 133 U. S., 315, 320. *In re Pennsylvania Co.,* 137 U. S., 451, 454; *Fisk vs. Henarie,* 142 U. S., 459, 467; *Shaw vs. Quincy Mining Co.,* 145 U. S., 444, 449.

Construing the provisions now in question, having regard to the natural meaning of its language and to the history of the *legislation*

*upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States."*

This language is quoted with approval in *Wabash Western Railway vs. Braw*, 164 U. S., 277, 278.

In the last case cited the service was on September 24, 1892, and the petition for removal was filed October 7, 1892. After the case was removed a motion was made to set aside the service.

In *Rosenthal vs. Coates*, 148 U. S., 142-147, the Court said:

> "Further, to sustain this removal would certainly violate the spirit of the removal acts which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the federal court."

In *Olds. vs. City Trust, Safe Deposit & Surety Co. of Philadelphia*, 114 Fed. R., 975 (C. C. D. Mass., opinion by Lowell, J.), the Court said:

> "Moreover, it would seem to follow, under the defendant's contention, that it could await a decision by the state court on the plea in abatement, and accept the decision, if that was favorable, but remove the case to this court if the decision was unfavorable. This cannot be. The defendant is entitled, by a seasonable removal, to take the decision of this court on its plea in abatement, but the fact that its plea is to the jurisdiction does not enable it to experiment with the state court first and with the federal court afterwards."

See also upon this point:

*Bragdon vs. Perkins-Campbell Co.*, 82 Fed R., 338.

*Kidder vs. Ins. Co.*, 117 Fed. R., 997, 998.

*Cleaver vs. Traders' Ins. Co.*, 40 Fed. R., 711.

## VIII.

## NO PRESENTATION OF PETITION AND BOND TO STATE COURT IN SESSION.

(THIRD GROUND IN MOTION TO REMAND, PRINTED RECORD, P. 96.)

No order from the state court was obtained upon the petition and bond for removal. The petition and bond were not presented to the state court. Judge Rogers of the state court approved the bond as to form and sufficiency of sureties, but he was not holding court at the time the petition and bond were presented, and approved the bond at chambers. The state court was not in session the day the bond and petition were presented and filed. (Printed Record, p. 3-6-97-98-102.)

The petition and bond for removal should have been presented to the state court in session. Their presentation to a justice of the state court at chambers and filing with the clerk were insufficient.

*Williams vs. Massachusetts Ben. Assn.*, 47 Fed. Rep., 533.

*La Page vs. Day*, 74 Fed. Rep., 977.

*Fox vs. Southern Ry. Co.*, 80 Fed. Rep., 945.

*Shedd vs. Fuller*, 36 Fed. Rep., 609.

*Roberts vs. C., St. P., M. & O. Ry. Co.*, 45 Fed. Rep., 433.

In *Williams vs. Massachusetts Ben. Assn.*, 47 Fed. R., 533 (C. C. Nor. D. of N. Y. Opinion by Coxe, J.), the Court said:

> "This motion turns, therefore, upon the question whether or not the presentation upon the 27th of June, and the subsequent filing in the clerk's office, was a compliance with the federal statute. Is it sufficient to present the petition and bond, when no court is in session, to a judge of the state court sitting in his office, and subsequently to file them in the office of the clerk? Manifestly not! It is the 'state court' which is authorized to act upon the petition, and not a judge or a clerk of the state court. In the case of *Roberts vs. Railway Co.*, 45 Fed. Rep., 433, it was said:
>
> 'The petition should be presented to the state court, and opportunity given that court to act. In this case the petition was presented to the clerk of the state court, and filed by him, and a certified copy immediately made and given the defendant. The court never had its attention called to the petition. This is not the proper practice indicated by the statute granting removals from the state court, or recognized by the United States Supreme Court.'
>
> *Shedd vs. Fuller*, 36 Fed. Rep., 609; *Stone vs. State*, 117 U. S., 430, 6 Sup. Ct. Rep., 799; *Crehore vs. Railway Co.*, 131 U. S., 240, 9 Sup. Ct. Rep. 692.
>
> As the cause is still in the Supreme Court of the State of New York, this court has no jurisdiction to grant the motion."

In *La Page vs. Day*, 74 Fed. R., 977 (C. C. Nor. D. N. Y. Opinion by Coxe, J.), on April 18, 1896, the petition and bond for removal were presented to a justice of the state court, who approved the bond; the Court said:

> "Notwithstanding an occasional dictum to the contrary, it is conceded by the defendant that the petition and bond must have been pre-

sented to the court, the mere filing in the clerk's office of Franklin County being insufficient. The issue, then, is narrowed to the single question: *Was the court in session on the 18th of April?*"

The defendant produced proof that it was in session and thereby saved the case from being remanded.

In *Shedd vs. Fuller*, 36 Fed. Rep., 609 (C. C. Nor. D. of Ill. Opinion by Gresham, J.), the Court held that a filing of the petition and bond with the clerk of the state court is not sufficient, as the Court has a right to pass upon them, and said:

> "The presentation of a proper petition and bond to the state court for its action is a jurisdictional prerequisite. *Stone vs. South Carolina*, 117 U. S., 430. Motion to remand sustained."

In *Fox vs. Southern Ry. Co.*, 80 Fed., 945-948 (C. C. W. D. of S. C. Opinion by Dick, J.), the Court held that the cause must be remanded where it appears that the petition and bond were filed in the clerk's office of the state court in vacation, and there is nothing to show that they were ever presented to the *court in session*. The Court said:

> "The removable statute imposes a duty upon the state court to accept a sufficient petition and bond, and proceed no further in the cause against the petitioner. It is certainly courteous, reasonable, just and lawful that such court should have opportunity of performing its duty by considering and acting upon the application before it surrenders its original and concurrent jurisdiction, or before it is deprived of jurisdiction by the operation of paramount laws of the United States. A wise and just public policy requires federal courts, in the exercise of their rightful jurisdiction, to accord to state courts the most liberal and cor-

dial comity that is consistent with their legal duty in the enforcement of paramount national laws.

As I am of opinion that the facts and proceedings appearing in the transcript, and the principles of law above announced, are fully sufficient to warrant an order remanding this case, I have deemed it unnecessary to consider and determine other questions presented by counsel on the argument."

In *Roberts vs. C., St. P., M. & O. Ry. Co.*, 45 Fed. R., 433, (Opinion by Nelson, J.), the Court said:

"This is a motion to remand made by the plaintiff. The correct practice is indicated by Judge Gresham in *Shedd vs. Fuller*, 36 Fed. Rep., 609. The petition should be presented to the state court and opportunity given that court to act. In this case the petition was presented to the clerk of the state court, and filed by him, and a certified copy immediately made and given the defendant. The court never had its attention called to the petition. This is not the proper practice indicated by the statute granting removals from the state court, or recognized by the United States Supreme Court.

Motion to remand granted."

In *Railroad Co. vs. Koontz*, 104 U. S., 5-15, the Court said:

"The state court must stop when the petition and bond are presented," etc.

This implies that the presentation must be to the court.

## IX.

## RES ADJUDICATA.

The court below should not have entertained the motion to set aside the service of the summons, arising upon the order to show cause.

This motion was made upon the affidavits of Mr. J. C. Stubbs and Mr. Maxwell Evarts, which are substantially the same as the affidavits of the same persons, used by the defendant in support of its motion in the state court, to set aside the service of the summons. Compare the affidavits of these persons used in the state court and found in the record on removal (Printed Record, pp. 35, 36 and 68), with their affidavits on the motion in the federal court. (Bill of Exceptions, Printed Record, pp. 94-103.)

The record shows that the motion came on for hearing in the state court at a special term held the 9th day of June, 1903, and after the defendant had presented the affidavit of Mr. Stubbs and plaintiff had presented affidavits in opposition, the court, at the request of the defendant, adjourned the hearing of the motion to a special term to be held July 11th, 1903, and gave the defendant leave to serve additional affidavits by July 1st, 1903. The defendant did serve additional affidavits and the plaintiff also presented additional affidavits. The affidavits on each side went into the facts exhaustively, the defendant presenting four affidavits and the plaintiff twelve and a certificate of the Secretary of State of the State of New York.

The affidavits on the part of the plaintiff showed, among other things, that the plaintiff is a

resident of New York (Printed Record, p. 61); that the cause of action arose in New York (Printed Record, pp. 54, 55, 60, 61, 62, 63, 64, 65); that the defendant has property in New York (Printed Record, pp. 31, 32, 33, 34-58); that the defendant has, and at the time of the service of the summons had an office at 120 Broadway, New York City (Printed Record, pp. 48, 49, 50), and that the summons was served upon J. C. Stubbs, a director of the defendant, at that office (Printed Record, pp. 47, 48). On September 28, 1903, the state court made an order denying the defendant's motion to set aside the service with $10 costs, and without granting the defendant any leave to renew the motion, which order was entered October 2, 1903, and has never been reversed or set aside (Printed Record, p. 29).

The Circuit Courts of the United States do not sit as courts of errors to review the decisions of the state courts. *Whether those decisions are right or wrong*, these United States Courts have no power to reopen questions once passed upon and decided by the state courts.

In *Duncan vs. Gegan*, 101 U. S., 810, 812, the Court said:

> "The transfer of the suit from the state court to the Circuit Court did not vacate what had been done in the state court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off.
>
> Before the suit of *Gegan vs. Bowman and Duncan* was removed to the Circuit Court,

> the rank of the appellant's mortgage had been finally settled by the judgment of the Supreme Court of the state on appeal. That was no longer an open question between the parties to that litigation. All the court from which the removal was afterwards made could do was to distribute the proceeds of the sale of the property in accordance with the directions of the Supreme Court. It had no power whatever to change the order of priorities as settled by the Appellate Court."

In *Loomis vs. Carrington,* 18 Fed., 97-99 (E. D. Mich.), the Court, Brown, J., said:

> "The rule is believed to be well established that in all cases of removals from state courts this court will not act as a court of errors, but will take the case precisely as it finds it, accepting all its decrees and orders as adjudications in the cause. A motion for a rehearing of a similar motion in the state court is only another name for an appeal, and should be denied, unless it is made for reasons which did not appear upon the previous argument. (*Duncan vs. Gegan,* 101 U. S., 810; *French vs. Hay,* 22 Wall., 231; *Brooks vs. Farwell,* 4 Fed. R., 166; *Wetherin vs. Continental Ry. & Trust Co.,* 11 Fed. R., 689; *Milligan vs. Lalance & Grosjean, Man. Co.,* 17 Fed., 465; *Smith vs. Schoed,* 6 Fed. R., 455.)"

The case of *Bragdon vs. Perkins-Campbell Co.,* 82 Fed. R., 338 (C. C. W. D. Pa. Opinion by Acheson, C. J.), was precisely like the one at bar. In that case it was held that where a non-resident defendant, sued in the state court, invokes the judgment of that court by a motion to set aside the service of the summons, he is concluded by the state court's decision, and cannot renew the motion in the federal court, after removing the cause, on substantially the same evidence. In the opinion the Court said:

"Now, undoubtedly it was open to the defendant, by promptly filing a petition for the removal of the case, to have obtained the judgment of this Court upon the question of the validity of the service. *Railway Co. vs. Brow*, 164 U. S., 271; 17 Sup. Ct., 126. But the defendant did not pursue the course it was at liberty to take, of declining to subject itself in any way to the jurisdiction of the State Court. It invoked the judgment of that court upon the question of the validity of the service. Certainly so long as the cause remained in the State Court, that question was within its cognizance. The proper determination of the question depended upon what the facts were. At the defendant's instance an issue of fact was raised in the State Court and submitted to its determination. The decision was against the defendant. Is the same question to be retried here upon substantially the same evidence? That, I think, is not permissible. This is not a court of review. The general rule is that upon the removal of a cause, the Circuit Court takes the case as it finds it, accepting the decree and orders made by the State Court as adjudications in the cause. *Loomis vs. Carrington*, 18 Fed., 97. As was said by Chief Justice Waite in *Duncan vs. Gegan*, 101 U. S., 810, 812, the Circuit Court 'takes the case up where the State Court left it off.' The present case, I think, falls within this general rule. In *Allmark vs. Steamship Co.*, 76 Fed., 615, where the defendant removed the cause after denial by the State Court of the defendant's motion to set aside the service of the summons, Judge Benedict held that the defendant was concluded by the decision of the State Court. And now, July 7, 1897, the rule to show cause why the service of the writ of summons should not be set aside, etc., is discharged, with leave to the defendant to plead within 30 days."

In *Allmark vs. Platte S. S. Co.*, 76 Fed. R., 615 (C. C. E. D. New York, Opinion by Benedict, J.),

the State Court had denied a motion to set aside the service of the summons, and the defendant renewed the motion in the Federal Court, but the renewed motion was denied, the Court saying:

> "In my opinion the defendant is concluded by the decision of the State Court made upon its own request, before the cause was removed. This Court takes the cause in the condition in which it was left by the State Court."

In *Denison vs. Shawmut Min. Co.*, 124 Fed. R., 860 (C. C. W. D. New York, decided August 6, 1903, opinion by Hazel, J.), the Court said:

> "This is a motion for rehearing upon a decision of the State Court setting aside an attachment prior to removal of the cause to this Court. It is uniformly held that the Circuit Court of the United States, to which a cause is transferred from the State Court, will not review any questions determined by that Court before removal; nor, indeed, will it listen to a motion for rehearing of a similar motion in the State Court, as such hearing is held to be merely another name for an appeal. *Loomis vs. Carrington* (C. C.), 18 Fed. 97-99; *Cleaver vs. Traders' Ins. Co.* (C. C.), 40 Fed., 711. All interlocutory questions decided while the cause was in the State Court are *res adjudicata* so far as this Court is concerned. *Brooks vs. Farwell* (C. C.), 4 Fed., 166, 2 McCrary, 220; *Milligan vs. Lalance & Grosjean Mfg. Co.* (C. C.), 44 Fed., 449; *Allmark vs. Platte S. S. Co.* (C. C.), 76 Fed., 615. It is undoubtedly true that the power to entertain a motion for rehearing may be exercised by this Court after a transfer of the cause from the State Court, (*Garden City Mfg. Co. vs. Smith*, Fed. Cas. No. 5,217, 1 Dill., 305), but such power should only be exercised in strict conformity with prevailing practice of the State Court from which the cause was removed. Now, it is quite clear from the preliminary discussion had upon this motion for leave to reargue that

an exhaustive hearing was had upon the merits before Judge Childs. No new facts are disclosed here. The entire claim to the right of rehearing is based upon the erroneous disposition of the motion in the State Court. The prevailing practice in that court is not to allow a rehearing unless it is manifest that all the facts were not presented to the Court upon the decision of the original motion, or unless some facts were overlooked which, through inadvertence or mistake, led the Court into error. *Van Wagener vs. Royce* (Sup.), 21 N. Y. Supp., 191; *The Matter of Crane*, 81 Hun., 96, 30 N. Y. Supp., 616.

No ground is here shown which would justify this Court in granting a rehearing. The motion is therefore denied."

In *Brooks vs. Farwell*, 4 Fed. R., 166 (C. C. D. Col.), the Court said:

"As to all questions that are passed upon in the State Court before the removal of the cause, they are fully and finally determined, so far as this Court is concerned, and can only be reviewed in the Supreme Court of the United States, if there be error in them."

We have been able to find but one case in the books where the Circuit Court of the United States made an order at variance with an order made by the State Court before removal of the action, and that case is *Miner vs. Markham*, 28 Fed. Rep., 387. In that case the motion to set aside the service of the summons was denied by the State Court, *"but without prejudice to the right of the defendant to renew the motion in that or any other court in which the case should be thereafter pending."* (Page 388.)

The Court in granting the motion in the Federal Court expressly based the decision on this leave granted in these words: *"and the motion made in*

*the State Court having been denied without prejudice to a renewal of the same,* the defendant has not waived his privilege, and can assert it here with the same force and effect as if the suit had been brought and the motion made in this court in the first instance." (Page 395.)

In the court below, the defendant cited the case of *Kern vs. Huidekoper,* 103 U. S., 485, but that case is not in point, for the reason that it was within the jurisdiction of the Federal Court, not of the State Court, to decide whether the case was removable, and the defendant and the Federal Court were not bound by the decision of the State Court, made without jurisdiction of the question, that the cause was not removable. It cannot be denied by the defendant that the State Court had jurisdiction in the case at bar to decide the motion made by the defendant to set aside the service of the summons.

In the court below, the defendant cited the case of *Bryant vs. Thompson,* 27 Fed. Rep., 881, where the Court held that if a proper showing had been made it could exercise the same power to set aside an order made by the State Court before removal of the action to the Federal Court, that the State Court could have exercised if the suit had not been removed. In that case the question before the Court was whether a receiever appointed by the State Court should be discharged.

This kind of a motion is the most favorable for the contention of the defendant, for the reason that a receiver is an officer of the Court, acting under the supervision and direction of the Court; he is a person in whom the Court should be able to place confidence and on whom great responsibilities are frequently placed.

A slight change in the circumstances of a receiver, or in his conduct, or in the estate intrusted to him, will frequently suffice to induce a court to discharge him. In this case the receiver was not selected by the Federal Court and there was not, therefore, that personal knowledge on the part of the Federal Court concerning the qualifications of the receiver and the confidence in his integrity which may be supposed to have existed if the Federal Court had selected him. Yet, with this handicap against the receiver, the Federal Court refused to grant the motion to discharge him. The Court said:

> "Suppose a motion were made in this court to discharge a receiver of its own appointment, and suppose the Court had refused to grant the application, would it entertain the same motion a second time, and without any additional evidence or showing, grant the application? It certainly would not.
>
> Without some most cogent reason the Court would not set aside its own solemn judgment, entered into after due consideration and full argument. Now, it appears that this same motion to discharge the receiver was made before the state district judge. No additional evidence to support the motion has been adduced before us. We shall treat the judgment of the state judge as we would our own order." (Pp. 882-883.)

Now apply the reasoning of this—the most favorable case for the defendant to be found in the books—to the case at bar.

Before the decision by the State Court of the motion made by the defendant to set aside the service of the summons in the case at bar, there was the most elaborate presentation of facts and discussion on each side. One hearing on the motion was had

on June 9, 1903, and each side presented its affidavits. At that time, after each side had presented its papers, the defendant requested the Court to adjourn the hearing and give it an opportunity to serve additional affidavits. The Court thereupon granted its request and adjourned the hearing of the motion to a special term held July 11, 1903, and made an order giving the defendant until July 1, 1903, to serve additional affidavits. Under this order the defendant served three affidavits in addition to the original affidavit of J. C. Stubbs, to-wit: the affidavits of Mr. Maxwell Evarts, Mr. Isaac E. Gates, a former director and vice-president of the defendant, and Mr. Watkins, who had been transfer agent of the defendant in New York City. (Printed Record, pp. 35-36-37-38-39 and 68.)

The plaintiff presented twelve affidavits and the certificate of the secretary of state. (Printed Rec., pp. 47 to 67.) The affidavits of the respective parties were presented and the matter fully argued to the State Court. After this thorough preparation and discussion by the parties, the Court took the motion under advisement, and on September 28, 1903, the State Court denied the defendant's motion with ten dollars costs, *and did not grant any leave to renew the motion.*

Now the defendant renews the motion in the Federal Court on substantially the same showing made in the State Court. If the cause had remained in the State Court, and the defendant had there renewed the motion, would the defendant have stood any chance whatever of having the motion granted? Undoubtedly not; and no one knows better than defendant's counsel that they would not have renewed the motion in the State Court.

Suppose again, that this action had been commenced in the Federal Court, and the same motion had been made, the same proceedings had been had and the same decision had been made on September 28, 1903, in the Federal Court as was made in the State Court. Would the defendant have renewed the motion on November 10, 1903, or, if it had, would the Court have entertained it? It is unnecessary to say that under those circumstances the defendant's counsel would not have thought of renewing the motion.

It is plain enough that what defendant's counsel wanted the Court below to do, and what the Court below did, was to act as a court of errors and review the decision of the State Court.

In *Oglesby vs. Attrill*, 14 Fed. R., 214, 215, the Court said: "Solicitor for defendant also moves the Court that the substituted service of process heretofore made in the case be set aside and annulled. I have examined the record, and I find that this question has been passed upon and adjudicated by the district judge sitting in this court in the early stage of the case; 12 Fed. Rep., 227. This decision is not open to review to any other judge sitting in this court in the same case."

In *Cole Silver Mining Co. vs. The Virginia and Gold Hill Water Co.*, 1 Sawyer (U. S.), 685-689, the Court said:

> "The injunction, although preventive in form, is undoubtedly mandatory in fact.
>
> It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit

judge possesses, as already stated, equal authority with myself in the Circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law should be disregarded or be open to review by the other judge in the same case."

In *Hayes vs. Dayton*, 20 Fed. R., 690 (Circuit Ct. S. D. N. Y.), Judge Coxe said:

"So long as this decision is undisturbed by the only tribunal which has a right to review it, it must remain the law governing the case. The spectacle of one court overruling or reversing another court of co-ordinate jurisdiction in the same circuit would certainly be an anomolous one. It would be without precedent and would lead to inextricable confusion."

*A motion can only be repeated on new grounds, and not on mere additional or cumulative evidence.*

*Ray vs. Connor*, 3 Edw. Ch., 478.

In the opinion the Vice-Chancellor said:

"One objection to the granting of the present motion is, that it is made upon the same ground and for the same purpose as the former motions, which have been denied without leave to renew. The objection appears to be well taken. A motion cannot be repeated except on some new ground; and affidavits which merely present additional or cumulative evidence on the points before presented are not to be considered as showing new grounds for the motion: *Hoffman vs. Livingston*, 1 J. C. R., 201; *Dunham vs. Winans*, 2 Paige's C. R., 24; and such is the present case. The affidavits now read are but an amplification of some of the grounds of the two former motions. There is nothing new presented, except it be additional evidence of facts which he then wanted to have an opportunity of introducing in his defense, and which was then, under the circumstances, denied him. He may suffer great injustice by this denial, but there must be an end to every litigated suit."

A motion once heard and decided cannot be repeated except on new grounds. It is not enough that additional evidence is offered by the affidavits.

*Hoffman vs. Livingston,* 1 John's Ch., 211.

The Chancellor said in the opinion:

> "The former motion, on the same point was heard, discussed and decided; and there would be great vexation if the same motion can be repeated. But it is said that the affidavits present new matter. They are intended, however, only as additional evidence of the matter urged in support of the former motion."

A motion made by the defendant to have the complaint made more definite and certain, and, in default of that relief being granted, for a bill of particulars, having been denied without any leave being given to renew it, a motion was made by him for a bill of particulars in reference to the second cause of action mentioned in the complaint herein.

Held, that the adjudication upon the prior motion was a bar to the making of the present motion.

*Klumpp vs. Gardner,* 44 Hun., 515.

In *Melville vs. Matthewson,* 49 N. Y. Super. Ct. (17 Jones & S.), 388-391, the Court said:

> "Aside from a few additional but wholly immaterial facts concerning which there is not even the pretense that they had been discovered since the first motion, there were no facts presented on the second motion which were not presented on the first. * * * Under such circumstances failure to ask for and obtain leave to renew, is ground for reversal." (Gen. Term Dec.)

The rule that a motion once heard and determined cannot be renewed without leave, applies to a motion founded on an irregularity.

*First Nat. Bank vs. Hamilton,* 50 How. Pr., 116.

In the opinion the Court says: "Counsel for the plaintiff objects, preliminarily, that the error of a special term cannot be corrected by a motion made at another, but can only be remedied by an appeal. I confess I do not see how the objection can be overcome. The points now made have been determined, and until reversed by a superior tribunal such determination is conclusive upon the parties. It is well settled that a motion, once heard and determined, cannot be renewed without leave, and the reason of that rule applies with full force. * * * There must be an end of discussion and litigation in the same tribunal at some point, and practice and common sense insist that a decision of the question shall end proceedings before and in the tribunal which decides. A contrary conclusion leaves parties the helpless subjects of endless litigation." (Pages 118 and 119.)

In *Mahr vs. Nor. Union Fire Ins. Society,* 127 N. Y., 452-459, the Court said:

"The plaintiffs did not appeal from the order of the Court requiring Kelly to be brought in, and as long as it remained in force it was an adjudication, establishing as the practice, if not the law, of the case that Kelly was a necessary party."

The decision of a vice-chancellor dissolving an injunction is conclusive between the same parties on any application for its revival on the same state of facts; or on a new state of facts, except upon leave first had to apply anew.

*Banks vs. The American Tract Society,* 4 Sandf. Ch., 438.

In *Day vs. Mertlock,* 87 Wis., 577-582, the Court said: "The first and second motions are based substantially on the same grounds. The first motion was denied with costs and absolutely, without any leave of renewal, and therefore the first order was *res adjudicata;* and the

second motion should have been denied on that ground. *Branger vs. Buttrick*, 28 Wis., 454; *Hoppe vs. C., M. & St. P. R. Co.*, 61 Wis., 367; *Webster vs. Oconto Co.*, 47 Wis., 226."

To the same effect:

*Rogers vs. Hoenig*, 46 Wis., 361-362.

"As a rule of practice, it is well settled that leave to renew a motion after its decision must be granted, if at all, at the time of such decision, and be a part and qualification of the order on the first motion."

*Webster vs. Board of Supervisors*, 47 Wis., 228.

An order made on an interlocutory motion is as much an adjudication and is as binding as a final judgment.

*Dwight vs. St. John*, 25 N. Y., 203-206;
*Williams vs. Barkley*, 165 N. Y., 48-54;
*Culross vs. Gibbons*, 130 N. Y., 447-454;
*Brown vs. Mayor*, 66 N. Y., 385-390.

In *Culross vs. Gibbons, supra*, the Court said;

"It is a well-established rule that where a matter has been submitted to an authorized judicial tribunal, its decision thereon is final between the parties, until it has been reversed, set aside or vacated; and the rule of *res adjudicata* applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. (*People ex rel. vs. Barnes*, 114 N. Y., 317; *Leavitt vs. Wolcott*, 95 id., 212; *People ex rel. vs. Hall*, 80 id., 117; *Demarest vs. Darg*, 32 id., 281; *Sibley vs. Waffle*, 16 id., 180; *Supervisors vs. Briggs*, 2 Denio, 33.)" (P. 454.)

In *Brown vs. Mayor, supra*, the Court said:

"When a matter in controversy between parties has been submitted to a competent judi-

cial tribunal, its decision thereon is final between the parties until it has been reversed, set aside or vacated; and the rule of *res adjudicata* applies not only to the judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. It applies not only to judgments rendered after a litigation of the matter in controversy, but to judgments rendered upon default or confession. (*Gates vs. Preston*, 41 N. Y., 113; *Newton vs. Houck*, 48 N. Y., 676.)" (P. 390.)

In the court below the defendant claimed that the defendant's motion in the State Court to set aside the service of the summons was not decided and determined by the State Court at the time the petition for removal was filed, for the reason that an appeal from the order of the State Court, denying the motion, had been taken and was pending undetermined at the time the petition for removal was filed.

If the defendant did not abandon its appeal to the Appellate Division of the State Court from the order denying the defendant's motion to set aside the service of the summons at the time the petition for removal was filed, that of itself would defeat a removal.

If that appeal was not abandoned, the only court in which it could be considered was the Appellate Division of the Supreme Court of the State of New York, to which it was taken.

As said in *Chicago, I. & N. R. R. Co. vs. Minn. & N. W. R. Co.*, 29 Fed. R., 337, the case cannot be pending in two courts at the same time.

The appeal could not be transferred from the

Appellate Division of the State Court to the Circuit Court of the United States and there heard. The Circuit Court of the United States is not an Appellate Court. Section 4 of the Act of March 3, 1891, Chapter 517, contains the following: "and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts." *If the* appeal could be transferred to the Circuit Court for hearing, why did not the defendant notice the appeal for argument in that court, after the filing of the record on removal, instead of making a new motion on new affidavits?

The making of the new motion was not permissible if an appeal from the order made in the State Court could be heard.

If defendant contends that the appeal was not abandoned, it is an admission that the case is still in the State Court. If the appeal was abandoned, the order appealed from is in the same condition as though it had never been taken.

An appeal from an order or judgment and a stay of proceedings pending such appeal do not suspend the order or judgment or affect its validity or effect.

*Sixth Ave. R. Company vs. Gilbert Elevated R. Co.*, 71 N. Y., 430;

*Genet vs. The President, Managers & Co. of the Del. & Hud. Canal Co.*, 113 N. Y., 472;

*Hovey vs. McDonald*, 109 U. S., 150-160-161;

*Knox County vs. Harshman*, 132 U. S., 14-16.

The appeal from the order in question was taken under Title IV of Chapter 12 of the Code of

Civil Procedure. This title includes Sec. 1351, which contains the following:

> "Security is not required to perfect the appeal; but, except where it is otherwise specially prescribed by law, *the appeal does not stay the execution of the judgment or order appealed from;* unless the court in or from which the appeal is taken, or a judge thereof, makes an order directing such stay."

An appeal that does not even amount to a stay cannot suspend the order appealed from.

## X.

## DID THE DEFENDANT APPEAR GENERALLY?

If this Court should hold that Section 421 of the Code of Civil Procedure does not do away with the old rule concerning what is sufficient to constitute an appearance, we press upon the consideration of the Court the acts of the defendant mentioned in the 17th, 18th, 19th, 20th, 21st and 22nd assignments of error.

Several of these acts, if not all of them, under the rule which obtains in most states and in the courts of the United States, were sufficient to constitute a general appearance on the part of the defendant.

The defendant in the notice of motion in the State Court did not specify the irregularities complained of in the service of the summons, and after stating in the notice that the motion will be for an order setting aside the service of the summons, the defendant states that the motion is *"for such other or further order as may be proper, with costs of motion."* The defendant having asked for an order

setting aside the service of the summons, the "other or further order as may be proper" asked for must be something different or in addition to the setting aside of the service of the summons, and the defendant, not having specified what other or further order it deems proper, left it to the judgment of the Court to decide what other or further order may be proper. The defendant not having limited the motion to its objection to the jurisdiction of the Court, and to its claim that the service of the summons was defective, and having asked for such other or further order as may be proper, and having left it to the judgment of the Court to decide what was proper, made a general appearance under the usual rule.

Then the obtaining of the stipulations from the plaintiff's attorneys, in this view of the case, should be considered an appearance in the case.

Under the words "*or for such other relief as may be just,*" in the notice of motion for a stay, the defendant obtained an order from the state court on October 24, 1903, staying (not proceedings under the order appealed from) *all proceedings* on the part of the plaintiff pending the appeal and until ten days after the decision thereof, except the taking of plaintiff's deposition *and relieving the defendant from its default in appearing.* This, under the old practice, would also be a general appearance.

It is respectfully submitted that the orders and judgment of the court below should be reversed, and the case should be remanded to the State Court, whence it came.

JAMES G. FLANDERS,
*Of Counsel for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES.

**October Term, 1904.**
**No. 460.**

HIRAM REMINGTON,
*Plaintiff in Error,*
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY,
*Defendant in Error.*

## SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

I.

The "Memorandum in opposition to motion to advance case unless oral argument is allowed" of defendant in error, contains on page 2 the following:

> "The bill of exceptions was presented to and signed by the Judge, without any notice to the defendant in error of such presentation. If notice of such presentation had been given, the bill of exceptions would have been very different and easier to understand."

This statement is misleading and unfair.

The bill of exceptions was settled and signed strictly in accordance with the rule of court. A proposed bill of exceptions was served on the defendant's attorneys on the 2nd day of September, 1904;

no amendments thereto have ever been served and the time for so doing has never been extended. Under the rule, if amendments are not served within ten days after the service of the proposed bill, the bill is taken as agreed to and is signed by the judge without notice. On September 16th, 1904, the bill of exceptions was signed upon the presentation of affidavits made by Mr. John N. Carlisle, one of plaintiff's attorneys, verified September 8th, 1904, and September 13th, 1904, respectively, showing the service of the proposed bill of exceptions on defendant's attorneys, on the 2nd day of September, 1904, and that on September 13th, 1904, no amendments had been served and the time for serving them had not been extended. The said affidavits of Mr. Carlisle and two other affidavits, showing among other things, the rules of the court relating to this matter, have been filed in this court and are printed as an appendix to this brief.

## II.

The defendant in error, in the first point of its brief, contends that an appeal to this court from a Circuit Court under the 5th section of the Court of Appeals Act (26 U. S. Stat., 826), is never allowed under the present practice unless the question of jurisdiction of the lower court is a question of its jurisdiction as a court of the United States and not a question of its jurisdiction under its general authority as a judicial tribunal. To this we agree. The question raised by the plaintiff's motion to remand and by his objections to the hearing and decision of the motion or order to show cause, why the service of the summons should not be set aside,

was whether the state or the United States Court had jurisdiction of the suit. The plaintiff contended that the suit had not been properly removed from the state court to the federal court, and the federal court was therefore without jurisdiction to hear and determine the cause, for several reasons plainly and distinctly stated. (Bill of Exceptions, Printed Record, pp. 95, 96 and 97; see first brief, pp. 15, 16 and 17.)

Among these reasons were the following:

(1) The defendant had waived and was estopped from asserting any right it may have had to remove said cause from the state court to the Circuit Court of the United States, by reason of the fact that the defendant had taken certain proceedings in the state court, specifically set forth in the first ground of the motion to remand.

(2) The petition for the removal of the cause from the state court to the federal court was not filed in the state court at the time, or any time before the defendant in said cause was required by the laws of the state or by the rule of the state court in which the suit was brought, to answer or plead to the declaration or complaint of the plaintiff. (Second ground of motion to remand, first objection to hearing of motion to set aside the service of summons.)

(3) "The said petition for removal was and is insufficient in law and according to the statute and practice." (Fourth objection to hearing of motion to set aside the service.)

(4) "The said petition for removal and the bond filed therewith were not presented to said state court." (Third ground of motion to remand.)

(5) "The Circuit Court of the United States in and for the Northern District of New York is without jurisdiction to hear and determine the cause." (Fourth ground of motion to remand.)

(6) "This court (the court below) has no jurisdiction to hear, consider or decide said motion or order to show cause or to do anything in said action except to remand the same to the state court." (Second objection to hearing of motion to set aside the service.)

The plaintiff took the position that the state court *had* and the United States Court had *not* jurisdiction of the action. The jurisdiction of the federal court was attacked, not upon "its general authority as a judicial tribunal," *but upon its authority as a court of the United States as contradistinguished from the State Court.*

It is true that in *Powers vs. Chesapeake & Ohio Railway Company*, 169 U. S., 92, 98, the Court said:

> "The existence of diverse citizenship or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester Etc. Railway vs. Swan*, 111 U. S., 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is in the words of Mr. Justice Bradley 'but modal and formal,' and a failure to comply with it may be the subject of waiver and estoppel."

Nevertheless in the same case, the Court held that:

> "A judgment of the Circuit Court of the United States against a party contending that the court has no jurisdiction because the case has

not been duly removed from a state court, may be reviewed as to the question of jurisdiction by this court, upon writ of error directly to that court under the act of March 3, 1891, c. 517, Sec. 5." (Headnote.)

The point made was that the petition was filed too late.

In the opinion the Court said:

"In the Circuit Court of the United States, the plaintiff contended that the court had no jurisdiction to entertain the case and to render the final judgment complained of, because the case had not been duly removed into the court from the state court in which it had been commenced.

"The question thus presented, was not, as in *Smith vs. McKay*, 161 U. S., 355, whether a suit, of which the Circuit Court of the United States was admitted to have jurisdiction, was cognizable on the common law or on the equity side of the court; but the question was whether the Circuit Court of the United States had any jurisdiction whatever of the case. The jurisdiction of the Circuit Court of the United States was thus in issue, and the question of its jurisdiction having been duly certified, the case was rightly brought from the Circuit Court of the United States directly to this court, under the act of March 3, 1891. c. 517, Sec. 5, upon the question of jurisdiction only. 26 Stat., 827." (Page 96.)

The question was not passed *sub silentio* in the above case. *The question was raised and was discussed and decided in the opinion.*

Before deciding whether to take the case at bar to this court or to the Circuit Court of Appeals, it was, of course, necessary to consider the authorities with great care. We knew that the question as to the proper forum was a most important and vital one

for our client, for we knew that if we should make a mistake in taking the case to this court and the writ of error should be dismissed, the six months in which a writ of error to the Circuit Court of Appeals could be sued out, would, by that time, have expired. Having found the above Powers case, where this precise question was raised and discussed and decided by the court without dissent, we relied and we think *we had a right to rely* upon the authority of that case to sustain our writ of error as we have taken it; and we could not do otherwise than follow the rule laid down by this court in that case.

We relied and we think we *had a right to rely* upon the case of *Shepard vs. Adams,* 168 U. S., 618, as authority for a direct appeal to this court where the question in the court below relates to the validity of the service of process on the defendant.

In this case, the question was not passed *sub silentio,* but was raised, discussed and decided. In the opinion the Court said:

> "This case is brought here, under Section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the

meaning of that term as used in the act; and the case of *Smith vs. McKay*, 161 U. S., 355, is cited as sustaining such a view.

"In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have proceeded by an action at law, which afforded an adequate remedy. The court below was of opinion that the plaintiff was not wrong in seeking his remedy in equity. Thereupon the defendant brought the case here directly, contending that the case involved the question of the jurisdiction of the Circuit Court, within the meaning of Sec. 5 of the act of March 3, 1891. But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.

"The present case differs from *Smith vs. McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court." (Page 622.)

This Court entertained jurisdiction in at least three similar cases, to-wit:

*Goldey vs. Morning News*, 156 U. S., 518.

*Conley vs. Mathieson Alkali Works*, 190 U. S., 406.

*Geer vs. Mathieson Alkali Works*, 190 U. S., 428.

Each of these cases was commenced in the Supreme Court of the State of New York, and each was removed by the defendant to the Circuit Court of the United States, and there the defendant moved to set aside the service of the summons. This motion was granted in each case and each case was taken by appeal or writ of error directly to this court and jurisdiction exercised by this court. The above cases cover all the jurisdictional questions arising in the case at bar, viz: proper removal and proper service.

To overcome the force of the foregoing authorities, the defendant cites:

*Louisville Trust Co. vs. Knott,* 191 U. S., 225.

*Bache vs. Hunt,* 193 U. S., 523.

*Courtney vs. Pradt,* 196 U. S., 89.

A glance at these cases is sufficient to show how greatly they differ from the case at bar and the authorities we have cited.

In the *Louisville Trust Co.* case, the question was one of priority between a receiver appointed by a federal court, and a receiver appointed by a state court, depending upon principles of comity, and was not properly speaking a question of jurisdiction at all.

In *Bache vs. Hunt,* the question decided by the Circuit Court was as to the right of a receiver to be reimbursed for moneys paid by him to discharge certain underlying liens. In the opinion the Court said:

> "The established rules of practice as to bringing in parties to ancillary or *pro inter-*

> *esse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves were alone involved." (Page 525.)

In *Courtney vs. Pradt,* the Circuit Court decided that the suit "could not be maintained against the foreign executor in the state court, nor in the federal court." This Court said in the opinion:

> "The case was dismissed for want of jurisdiction over it, *as a suit against a foreign executor, in the courts of Kentucky.*"

The opinion further says:

> "It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was lack of jurisdiction in the federal courts *as contradistinguished from the state courts.*"

The Court also says:

> "No single and definite issue as to the jurisdiction of the Circuit Court as a federal court is presented."

In the case at bar the motion to remand makes a most definite issue as to the jurisdiction of the federal court.

Referring to *Shields vs. Coleman,* 157 U. S., 168, the defendant's brief, on page 13, says:

> "The Shields case is relied on by the plaintiff in error as showing *his right* to come direct to this court in the case at bar."

This is a mistake. We cite the Shields case not for the purpose of showing our *right* to come to this court, but the *method* of coming. It is included among the cases cited by us for the purpose of showing that the certificate concerning the jurisdictional question is sufficient.

## III.

On page 22 of the brief for the defendant in error, counsel makes two short quotations from the judgment and from the order allowing the writ of error, and then says:

> "These citations from the record are relied on by the plaintiff in error as rendering unnecessary the certificate as to jurisdiction required by the act of Congress and the practice of this court."

This statement of counsel is no more candid than his statement concerning the bill of exceptions. We do not understand why he should say that we rely upon these two short quotations, when on pages 33, 34, 35, 36, 37, 38 and 39, of our first brief, in the point entitled, "Certificate Concerning the Jurisdictional Question," we have made very extensive quotations from the judgment, the bill of exceptions, the petition for writ of error and the order allowing the writ of error, and then say:

> "No further certificate concerning the question of the jurisdiction of the court below in issue is necessary,"

Citing five decisions of this court. The jurisdictional question in the case is plainly and definitely stated in the recitals in the judgment, quoted on pages 33 and 34 of our first brief. In the bill of exceptions on pages 93, 94, 95, 96 and 97, of the printed record, the issue concerning the jurisdiction of the court below is plainly set forth. The bill of exceptions shows that the motion to remand was denied, the motion to set aside the service of the summons was granted and thereupon the action

was dismissed for want of jurisdiction of the defendant, and the certificate to the bill of exceptions says:

> "And I hereby certify that said bill of exceptions contains all the proceedings had in this court in said cause and all the evidence and proofs produced in said proceedings, and I further certify that the jurisdiction of the court is in issue in said case and is the only question arising in said case." (Printed Record, p. 105.)

The bill of exceptions shows that there was no conflict in the proofs produced in the court below, and that the jurisdictional question to be decided was simply a question of law, arising upon undisputed facts.

The plaintiff's petition for writ of error, a large part of which is quoted on pages 35, 36 and 37, of our first brief, sets forth in detail the question of jurisdiction raised and decided in the court below. The order allowing the writ of error, quoted from on pages 38 and 39 of our first brief, contains among the recitals, the following:

> "And the jurisdiction of the court being in issue in this case, and the only question arising in said action, and the only question tried and decided by this court therein being the question of the jurisdiction of the court."

This order adopts the statement concerning the jurisdictional question, contained in the petition. After the lengthy recitals contained in this order, it concludes as follows:

> "It is ordered and considered by the court that said writ of error to the Supreme Court of the United States from said orders and said final judgment dismissing said suit for want

> of jurisdiction of the defendant, be and the same is hereby allowed and awarded upon said petition of the plaintiff, solely upon the question of the jurisdiction of the Court, as prayed for in said petition, *to review the question of jurisdiction of the court in said petition mentioned, which is the only question arising herein.*"

It would be difficult to cover the jurisdictional question in a case with any more complete certificate than is contained in the papers mentioned and quoted from in the first point of our first brief.

In the case of *Excelsior Wooden Pipe Company vs. Pacific Bridge Company*, 185 U. S., 282, 285, this court said, at page 285:

> "This decree, after reciting 'that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction.' An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed 'from the final order and decree dismissing said suit for want of jurisdiction.' This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court."

*In re Lehigh Mining and Manufacturing Company, Petitioner*, 156 U. S., 322, 325, 327, the following was the order allowing the writ of error:

> "'The plaintiff, considering itself aggrieved by the rulings of said court in the said case, in which final judgment was rendered at the May term, 1894, to-wit., on May 30, 1894,

of said Circuit Court held at this place, dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof, and having on the 30th day of May, 1894, filed its bill of exceptions, and having on this day filed an assignment of errors and its petition praying for a writ of error to said judgment and proceedings to the Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, be sent to said Supreme Court.

'Now on this day, to-wit., May 30, 1894, it is ordered and considered by this court that said writ of error be allowed and awarded as prayed for, * * *'."

This was held to be a sufficient certificate.

In the opinion the Court said:

"The question involved was only the question of jurisdiction, and the judgment not only recited that for reasons in writing, filed as part of the order, the court considered that it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction; but the District Judge certified in the bill of exceptions that it was 'held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed'; and, in the order allowing the writ of error, certified in effect that it was allowed 'upon the question of jurisdiction'."

In *Huntington vs. Laidley*, 176 U. S., 668, 673, 674, 675, 676 and 677, the Court said, on page 676:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways:

by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below."

After citing authorities, the Court then refers to the recitals in the decree, and says, on page 677:

> "The final decree, therefore, clearly shows that the question decided below was a specific question of jurisdiction only. This dismissal of the suit for want of jurisdiction was the only ground assigned for the appeal; and the appeal was allowed 'as prayed for'."

In *Interior Construction and Improvement Company vs. Gibney*, 160 U. S., 217, 219, the Court said, at page 219:

> "The record shows that the only question tried and decided in the Circuit Court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891, c. 517; Sec. 5, 26 Stat., 828."

In *Shields vs. Coleman*, 157 U. S., 168, 175, 176, the Court said, on pages 176 and 177:

> "But under the authority of *United States vs. Jahn*, 155 U. S., 109, and *In re Lehigh Company*, 156 U. S., 322, the statement in the last order quoted from the record taken in connection with the petition upon which it was founded must be held to be a sufficient certificate. It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated."

The judgment, bill of exceptions, petition for writ of error and order allowing the writ of error in this case, clearly bring it within the above authorities, and under these authorities the question concerning the jurisdiction of the court has been sufficiently certified to this court.

IV.

The burden of the argument in the brief for the defendant in error on the question concerning the time when the petition for removal should be filed, is to the effect that the time for filing such petition had not expired, or even commenced to run, because the complaint had not been served. If this is a good argument, the time for a defendant to file a petition in a case, where the complaint was not served with the summons, never expires or commences to run, in case the defendant fails to demand a copy of the complaint, although the time for entering judgment has arrived and judgment may have been entered and, although there be no question whatever concerning the legality of the service of the summons. The legality of the service of the summons in this case has been established by the order of the state court denying the defendant's motion to set aside the service of the summons, which order was made by a court having jurisdiction to render it. The brief for the defendant in error does not attempt to explain why the defendant failed to demand a copy of the complaint, although we have shown, on pages 54, 55, 56, 57 and 58, of our first brief that under Sections 421 and 479 of the Code of Civil Procedure of the State of New York, as construed by the courts of that state, the defendant

could have demanded a copy of the complaint within twenty days after the service of the summons, without making an appearance in the case, the statute being evidently framed with just such a case as the one at bar in view, and to put a defendant who is served with a summons without a complaint in exactly the same position with the same privileges and advantages, as if the complaint had been served with the summons. The counsel for the defendant in error has not attempted to answer that part of our argument contained on the pages above mentioned.

Respectfully submitted,

JAMES G. FLANDERS,

*Of Counel for Plaintiff in Error.*

## APPENDIX.

### SUPREME COURT OF THE UNITED STATES.

HIRAM REMINGTON,
*Plaintiff in Error,*
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY,
*Defendant in Error.*

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

FREDERICK H. REMINGTON, being first duly sworn, deposes and says that he is an attorney and counselor-at-law, duly admitted to practice in the courts of the State of New York and in the courts of the State of Wisconsin. That he has been one of the counsel for the plaintiff in error in the above entitled action since its commencement in the Supreme Court of the State of New York. That the statement hereinafter set forth and contained in "Memorandum in Opposition to Motion to Advance Case unless Oral Argument is Allowed," signed by Mr. Maxwell Evarts, of counsel for the defendant in error, and submitted to this court on the 20th day of February, 1905, in the above entitled case, is misleading and should be corrected. That the statement referred to is the following, on page 2 of said memorandum:

> "The bill of exceptions was presented to and signed by the judge, without any notice to the defendant in error of such presentation. If notice of such presentation had been given, the bill of exceptions would have been very different and easier to understand."

Affiant prepared the said bill of exceptions and sent the same, with a notice stating that the plaintiff in said action proposed said bill of exceptions, to the firm of Brown, Carlisle & Hugo, plaintiff's attorneys of record in said action, residing at Watertown, New York, for the purpose of having the same served upon the firm of Purcell, Walker & Burns, the attorneys of record for said defendant in said action. That the said proposed bill of exceptions, with said notice, was served upon said firm of Purcell, Walker & Burns on the 2nd day of September, 1904, as appears by the annexed affidavit of John N. Carlisle, verified the 8th day of September, 1904; that on the 13th day of September, 1904, no amendments to said bill of exceptions had been served and no paper relating to said bill of exceptions had been served by the defendant's attorneys, as appears by the annexed affidavit of said John N. Carlisle, verified the 13th day of September, 1904. That upon receiving the said affidavits from said John N. Carlisle, and on the 15th day of September, 1904, affiant mailed the said proposed bill of exceptions, said notice and said affidavits, together with a letter signed by Mr. James G. Flanders, who was also of counsel for the plaintiff in said action, to Hon. George W. Ray, district judge of the United States for the Northern District of New York, at Norwich, New York, and that the annexed letter, dated September 15th, 1904, is a copy of the said letter so mailed to said judge. That in due course of mail said bill of exceptions was duly returned by the said judge, signed by him, and affiant thereupon caused the same to be filed in the office of the clerk of the Circuit Court of the United States for the Northern District of New York. That affiant did not file the said two affidavits of said John N. Carlisle and the said notice proposing the said bill of exceptions, for the reason that they were not part of the record in the case and were simply necessary for the purpose of informing Judge Ray that the rule of the court had been complied with and the time for serving the amendments to the proposed bill of exceptions had elapsed, and no amendments had been served. That the said presentation of

said bill of exceptions to the said judge, for his signature, was in strict accordance with the rule of the court. That the fifth rule of said Circuit Court of the United States for the Northern District of New York, taken from a printed pamphlet entitled "Rules of the Circuit Court of the United States for the Northern District of New York," received by affiant from the clerk of said Circuit Court on the 10th day of November, 1903, is as follows:

> "Rule V. In cases not provided for by the rules of this court, the rules of the District Court for the Northern District of New York, so far as the same are in their nature applicable, are to be considered as rules of this court."

That included in the same pamphlet are nine rules of the district court which are stated in said pamphlet to be applicable to Circuit Court practice as provided by said circuit rule 5; that Rule 83 of said district rules is one of said nine rules so included in said pamphlet, and reads as follows:

> "Rule LXXXIII. In all cases not provided for by the rules of this court, or by law, the practice of the Supreme Court of this state, as prescribed by the Revised Statutes of this state, and by the rules of the said court, shall regulate the practice of this court, so far as the same may be applicable."

That neither said Circuit Court rules nor said district court rules provide a method for proposing and settling cases or bills of exceptions and such proposal and settlement is therefore regulated under said last mentioned rule, by the rules of the Supreme Court of the State of New York. That attached hereto, marked "Exhibit A," are Rules 32, 33, 34 and 35, of the Supreme Court rules of the State of New York, adopted in convention of the justices of the Supreme Court assigned to the appellate division thereof, held at Albany December 4th, 1895, pursuant to Code of Civil Procedure, Section 17, amended October 24, 1899. That these rules are taken from a printed copy of said rules, in affiant's possession, and that said rules, a copy of

which is hereto attached, marked "Exhibit A," are the only rules contained in said Supreme Court rules of the State of New York, relating to cases and bills of exceptions and settlement of the same. That Rule 32 of said Supreme Court rules provides that whenever it shall be necessary to make a case or a case and exceptions, or a case containing exceptions, the same shall be made and a copy thereof served on the opposite party, and that the party served, within ten days thereafter, may propose amendments thereto and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments, will be submitted for settlement at a time and place to be specified in the notice. Rule 33 of said Supreme Court of the State of New York reads as follows:

> "Rule XXXIII. Failure to Make a Case. If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments and the other to notify an appearance before the judge, or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed."

FREDERICK H. REMINGTON.

Subscribed and sworn to before me this 24th day of February, 1905.

FRED A. FOSTER,
*Notary Public,*
Milwaukee County, Wisconsin.

My commission expires June 18, 1905.
(Notarial Seal.)

(Certificate of Clerk of Circuit Court, Milwaukee County, Wis., attached.)

SUPREME COURT OF THE UNITED STATES.

HIRAM REMINGTON,
*Plaintiff in Error,*
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY,
*Defendant in Error.*

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY, }

JAMES G. FLANDERS, being first duly sworn, says:

I am counsel for the plaintiff in error in the above entitled case in this court, and the counsel for said plaintiff when said case was in the Circuit Court of the United States for the Northern District of New York. On the 15th day of September, 1904, I signed a letter dated September 15, 1904, of which the annexed is a copy and caused the same to be mailed, with the proposed bill of exceptions and the affidavits of John N. Carlisle therein mentioned, to Hon. George W. Ray, district judge of the United States for the Northern District of New York, at Norwich, New York. That the said original affidavits of said John N. Carlisle are hereto attached and are verified respectively the 8th day of September, 1904, and the 13th day of September, 1904.

JAMES G. FLANDERS.

Subscribed and sworn to before me this 24th day of February, 1905.

FRED A. FOSTER,
*Notary Public,*
Milwaukee County, Wisconsin.

My commission expires June 18, 1905.
(Notarial Seal.)

(Certificate of Clerk of Circuit Court, Milwaukee County, Wis., attached.)

WINKLER, FLANDERS, SMITH, BOTTUM & VILAS,

COUNSELORS-AT-LAW,

MILWAUKEE, Wis., Sept. 15, 1904.

HON. GEORGE W. RAY,

*United States Judge,*

Norwich, N. Y.

DEAR SIR:—In the case of Hiram Remington vs. Central Pacific Railroad Company, the judgment dismissing the action for want of jurisdiction of the defendant, was entered August 30, 1904. On the 2nd day of September, the plaintiff's proposed bill of exceptions was served upon the defendant's attorneys. The ten days allowed by the rule for proposing amendments have expired, and the time for proposing amendments has not been extended and no amendments have been served, as appears from the annexed affidavits of John N. Carlisle attached to the bill of exceptions. Will you kindly sign the certificate at the end of the bill and return the bill of exceptions to us?

I am informed that you will hold court in Utica on September 20th. Will the session of court at that time probably be short or will it last several days? I inquire for the reason that I desire to know where to send the papers for the purpose of getting the necessary order for the issuing of the writ of error in the case.

Yours very truly,

(Signed) JAMES G. FLANDERS.

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK.

HIRAM REMINGTON,
*Plaintiff,*
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY,
*Defendant.*

STATE OF NEW YORK, JEFFERSON COUNTY, } ss.

JOHN N. CARLISLE, being duly sworn, says that he resides at the City of Watertown, New York, and is a member of the firm of Brown, Carlisle & Hugo, who are attorneys for the plaintiff in the above entitled action; that on the 2nd day of September, 1904, he personally served the annexed proposed bill of exceptions and the notice thereto annexed, in the above entitled action, upon the firm of Purcell, Walker & Burns, who are attorneys for the defendant in said action, by delivering to and leaving with Henry Purcell, a member of said firm, at the office of said firm of Purcell, Walker & Burns, at the City of Watertown, Jefferson County, New York, a true copy of said bill of exceptions and notice; and that the deponent then personally knew the said Henry Purcell to be a member of said firm and one of the attorneys of record for the defendant in said action; that the said defendant's attorneys retained the said copy of said bill of exceptions and notice and have not returned the same.

JOHN N. CARLISLE.

Subscribed and sworn to before me this 8th day of September, A. D., 1904.

MASON A. SWAN,
*Notary Public,*
Jefferson County, New York.

(Notarial Seal.)

IN CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

HIRAM REMINGTON,
*Plaintiff,*
*vs.*
CENTRAL PACIFIC RAILROAD COMPANY,
*Defendant.*

STATE OF NEW YORK, JEFFERSON COUNTY, } ss.

JOHN N. CARLISLE, being duly sworn, deposes and says that he resides at the City of Watertown, N. Y., and is one of the attorneys of record of the plaintiff named in the above entitled action.

Deponent further says that he personally served the bill of exceptions on behalf of the plaintiff in this action upon Henry Purcell, one of the attorneys for the defendant on the 2nd day of September, 1904; that since that time no amendments to said bill of exceptions have been served; that the time for serving the amendments has expired and has not been extended in any way; that the bill of exceptions has not been returned by defendant's attorneys and no paper relating to said bill of exceptions has been served by defendant's attorneys upon the law firm of Brown, Carlisle & Hugo, of which deponent is a member.

JOHN N. CARLISLE.

Sworn to before me this 13th day of September, 1904.

JNO. CONBOY,
*Notary Public.*

(Notarial Seal.)

## EXHIBIT "A".

### Rule XXXII.

CASES, EXCEPTIONS, WHEN SERVED; AMENDMENTS; SETTLEMENT, ETC.

Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof served on the opposite party within the following times:

If the trial was before the court or referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon.

In the Surrogate's Court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

If the trial were before a jury within thirty days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry.

The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place to be specified in the notice, to the judge or referee before whom the cause was tried.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the

number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer he must refer at the end of each amendment to the proper page of such minutes. The judge or referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than ten days after the service of such notice. The lines of the case shall be so numbered that each copy shall correspond. The surrogate, on appeal from his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

Cases reserved for argument and special verdicts shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony on the approval of the judge.

No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such applications. (As amended October 24, 1899.)

## Rule XXXIII.

### Failure to make a case.

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge, or referee, they shall respectively be deemed, the former to have agreed to the case as proposed and the latter to have agreed to the amendments as proposed.

## Rule XXXIV.

CASE AND BILL OF EXCEPTIONS; CONTENTS; RESETTLEMENT; EXHIBITS.

A bill of exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken on the trial; and it shall be the duty of the judge upon settlement to strike out all the evidence and other matters which shall not have been necessarily inserted.

A case or exceptions shall not contain the evidence in *hæc verba*, or by question and answer, unless ordered by the judge or referee by or before whom the same shall be settled. But the facts of the case, together with the rulings on the trial, shall be stated in a narrative form, except that where it is claimed by either party that any particular testimony should be given in *hæc verba*, the judge or referee who settles the case shall determine whether or not a proper presentation of the case for review requires such portion of the evidence to be so stated in *hæc verba*, whereupon the case shall be made accordingly.

If any case or bill of exceptions does not conform to this rule, the court before which the same shall be brought for review may order the same back for resettlement.

Exhibits shall not be printed at length unless the judge or referee so direct.

Where, upon non-enumerated motions, voluminous documents have been used which are material only as to the fact of their existence, or as to a small part of their contents, the parties may, by stipulation, or the court or judge below may, upon notice, settle a statement respecting the same, or the parts thereof to be returned upon the appeal from the order to be used in place of the original documents.

## Rule XXXV.

### Case to be signed; service of copy.

When a party makes a case, or a case and exceptions, he shall procure the same to be signed by the judge or referee, and filed within ten days after it shall have been settled, or it shall be deemed abandoned, unless the time is extended by order.

FILE COPY.

FILED
FEB 17 1905
JAMES H. McKENNEY,
Clerk

# Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 460.

HIRAM REMINGTON,
*Plaintiff in Error,*

*vs.*

CENTRAL PACIFIC RAILROAD COMPANY,
*Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF NEW YORK.

## MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE CASE UNLESS ORAL ARGUMENT IS ALLOWED.

MAXWELL EVARTS,
*Of Counsel for Defendant in Error.*

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 460.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF NEW YORK.

## Memorandum in Opposition to Motion to Advance Case unless Oral Argument is Allowed.

No opposition is in any way made to the advancement of the case. Objection however is raised that the case should not be advanced unless an opportunity is given the parties to orally present to the court the difficult questions involved.

The case is of just as much importance to the defendant in error as any other case, and there would seem to be no just reason why in this case it should be deprived of its right to orally present it to the court, because the other side has seen fit to advance it, whereas if no advancement had been applied for, the defendant in error would have had the opportunity to argue it orally. It does not seem as if the rights of a defendant in error should depend upon the whim of the opposite party. If the latter moves to advance then the defendant in error cannot argue his case. If no motion is made to advance then he can.

In view of the fact that the plaintiff in error has never taken any step in the case beyond the serving of his summons, the record is certainly voluminous, and one very difficult to understand. The bill of exceptions was presented to and signed by the Judge without any notice to the defendant in error of such presentation. If notice of such presentation had been given the bill of exceptions would have been very different and easier to understand.

There are at least three important questions of jurisdiction in this case, each depending upon its own set of facts to be extricated from a most complicated record and it is certainly most

difficult, if not quite impossible, to point out in a written brief, so clearly that there can be no mistake, the relation of these questions to the facts in the case; that is to say, the jurisdictional questions are difficult and complicated and depend upon facts in the record which are so intricate that it is by no means an easy, even if a possible task, to so present them in a written brief that the court will appreciate with certainty what are the important facts to which it should give consideration.

If there is ever any virtue or advantage in the oral presentation of a case to a court, it would seem to be in a case in which the record is confused and the questions of law are difficult and important. It would therefore appear requisite for the interests of the parties to this cause or at least of the defendant in error that there should be given an opportunity to orally present the questions involved to the court and I therefore respectfully ask that an opportunity be given to argue this case orally at an early date.

MAXWELL EVARTS,
Of Counsel for Defendant in Error.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 460.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

## BRIEF FOR DEFENDANT IN ERROR.

### Statement.

The plaintiff in error is a citizen and resident of the Northern District of New York, residing in Jefferson County, one of the northern tier of counties of the State (Record, p. 57).

The Central Pacific Railroad Company, the defendant in error, is a California corporation, and

in July, 1899, transferred all its business and property of every kind to the Central Pacific Railway Company, a corporation of the State of Utah (See Appendix to Brief, p. 1), under the provisions of the so-called Central Pacific Readjustment, which was carried out in pursuance of the provisions of the Act of Congress of July 7, 1898 (30 U. S. Stat., p. 659). Since the 29th day of July, 1899, the Central Pacific Railroad Company has done no business of any kind in the State of New York or elsewhere, and has had no property of any description either in the State of New York or anywhere else (Record, pp. 74, 103).

The amount involved is more than two thousand dollars exclusive of interest and costs. The case therefore has the requisite conditions of citizenship and amount involved to make it removable to the federal court for trial.

On April 10, 1903, this action was begun in the Supreme Court of the State of New York, County of Jefferson, by the service of the summons only in the City of New York upon J. C. Stubbs, at the time a director of the defendant residing in Chicago, who was in New York City for a few days on business in no way connected with the defendant (Record, p. 74).

No complaint has ever been served in the case The time of the defendant to plead or answer had therefore never begun to run and its time to remove the case was under the Removal Act until its time to file some pleading in opposition to the complaint had expired.

The summons itself did not disclose whether the action was removable into the federal court (Record, p. 70). No diversity of citizenship was shown upon its face. The amount claimed by the plaintiff did not appear from the summons, and the defendant had no knowledge or information and no means of ascertaining whether the action involved the sum of two thousand dollars, exclusive of interest and costs (the jurisdictional amount required by the Removal Act).

The defendant, not being advised by the summons or otherwise, that the case was one which under the statutes it had the right to remove and try in the federal court, appeared *specially* in the state court, and on May 11, 1903, served a notice of motion to set aside the service of the summons (Record, pp. 69 and 70). No general appearance in the state court was ever entered for the defendant. The motion to set aside the service of the summons was heard by the state

court, and eventually decided against the defendant, and an order entered denying the motion on October 2, 1903 (Record, pp. 29 and 71).

On October 15, 1903, an appeal to the Appellate Division of the New York Supreme Court for the Fourth Department was taken from the order of October 2, 1903 (Record, p. 28), and thereafter and on October 16, 1903, a notice of motion to stay proceedings in the action, pending the appeal, was served upon the plaintiff's attorneys. This motion was returnable October 24, 1903 (Record p. 25).

After said appeal had been taken by the defendant from the order denying the motion to set aside the service of the summons, and after the motion to stay proceedings, the attorneys for the plaintiff on October 19, 1903, obtained an order for the examination of the plaintiff before trial (Record p. 80). This *ex parte* order for the examination of the plaintiff was served upon the attorney for the defendant on October 23, 1903, together with an affidavit of the plaintiff, verified the 16th day of October, 1903, in which the character of the action and the amount demanded by the plaintiff, viz, $414,492.64 was for the first time disclosed (Record p. 102).

The cause of action of the plaintiff was apparently based upon certain stock speculations made by him in 1879 or 1880, which had not turned out successfully. As he says he entered into these stock speculations by reason of certain articles in regard to the Central Pacific Railroad Company which appeared in Poor's Manual in 1879 and 1880, which articles he learned twenty years or more afterward, viz, in the month of December 1902, were untrue (Record pp. 61 and 81).

The defendant as promptly as possible after it was advised by the affidavit of the plaintiff that the case was a removable one, in that it involved more than two thousand dollars, exclusive of interest and costs, filed its petition and bond for the removal of the case to the federal court. It could not have been removed before, because it did not before appear from the record to be a removable case as it was held by this Court in *Powers* v. *Railroad Co.*, 169 U. S. 92, 100, that "so long as there does not appear of record to be any removable controversy, *no party* can be entitled to remove it."

The defendant was not required to remove the case as soon as it did, for the reason that its time to do so did not expire until the time came under

the State practice for it to file some pleading in opposition to the complaint, and the complaint had not and has not yet been served in the case at bar. The defendant removed the case as soon as it became a removable case, because it preferred to try it in the federal courts and not because it was under any obligation to then act in the matter.

Upon the return of the motion of the defendant to stay proceedings, pending the appeal in the state court (notice of which motion had been served on the plaintiff on October 16, 1903, after the appeal to the Appellate Division had been taken, and prior to the receipt of any information by the defendant to the effect that the case was one which could be removed to the federal court), the court, upon the application of the attorney for the defendant, relieved the defendant from a default as to its general appearance (not in its time to answer) (Record, p. 24), which occurred under the following circumstances, to wit:

> After the argument in the state court of the motion to set aside the service of the summons, Mr. Purcell, the attorney who had entire charge of the case for the defendant, was taken seriously ill, and was obliged to

go to New York City and there be operated on at a hospital. He was still ill in October, 1903, suffering from the effects of the operation, and unable to give his usual attention to business. When the motion to set aside the service of the summons was denied, Mr. Purcell, the defendant's attorney, assumed that he had, by stipulation from the attorneys for the plaintiff, twenty days after the entry of the order denying the motion, in which to appear generally in the case, if, in the meantime, it should be determined by him to be best not to appeal. It subsequently transpired, after the appeal had been taken, that the extension of time in which to appear generally, which the defendant had obtained, *was for ten days instead of twenty days*, and the defendant was as a matter of fact in default in appearing (not answering) at the time the notice of appeal was served, and for the period from the 12th day of October to the 15th day of October (Record, p. 102). This default in appearing (not answering) was of course at once relieved by the court and no opposition was made by counsel for the plaintiff. The order relieving the defendant from its default in appearing was entered in the clerk's office at Watertown on the 26th day of October, 1903, and upon the same

date a petition and bond were filed in accordance with the provisions of the statutes of the United States for the removal of cases to the federal court (Record, pp. 71–72).

After the removal of this action to the United States Circuit Court for the Northern District of New York, an order was obtained directing the plaintiff to show cause as to why the service of the summons should not be set aside. The order to show cause also extended the time of the defendant to enter a general appearance until twenty days after the determination of the motion arising upon the order to show cause (Record, pp. 73–74).

Upon the return day of said order to show cause, the plaintiff made a motion to remand the case to the state court. The two motions were argued and heard together, and the court denied the motion to remand the case to the state court (Record, pp. 75–76) and granted the motion to set aside the service of the summons (Record, pp. 77–78).

The judgment setting aside the service of the summons has now been brought to this Court under the fifth section of the Judiciary Act of 1891 (26 U. S. Stat., 826) instead of to the Circuit

Court of Appeals for the Second Circuit, upon the theory that there is a question of jurisdiction involved of such a character as to permit the bringing of the case direct to this Court from the United States Circuit Court for the Northern District of New York.

There is no certificate in the record as required by the statute and the practise of this court, nor is there anything in the record either in the final judgment or in the bill of exceptions or elsewhere which in any way indicates that the case was dismissed by the court below because it was without jurisdiction as a court of the United States, rather than because without jurisdiction in respect of its general authority as a judicial tribunal.

The important facts not to be lost sight of in this discussion are as follows:

I.

It is conceded that there was a difference of citizenship between the parties, which entitled the defendant to remove the case to the federal court.

II.

The amount involved was sufficient to authorize removal. This fact was unknown to defendant

and did not appear from the record until two or three days before the filing of the petition and removal bond (Record, p. 102).

III.

No complaint was ever served by the plaintiff. The time of the defendant therefore to file any paper or take any step in opposition to the complaint had not even begun to run at the time of the removal of the case and consequently its time to remove the case was under the Federal Statutes still open.

IV.

The only objections raised to the removal are formal and technical (Record pp. 96–97) and do not rest "on the contention that there was a lack of jurisdiction in the federal court as contra-distinguished from the state court" *Courtney* vs. *Pradt*, 196 U. S., 89 (Decided Jan. 3, 1905).

V.

The defendant had no property and did no business in the State of New York at the time the summons was served and had had no property and had done no business in such State for years before (Record pp. 94 and 103).

VI.

The director of the defendant who was served with the summons, lived in Chicago, and was at the time of the service temporarily in New York City for a few days on business in no way connected with the defendant. He was in New York City in his individual capacity and not as a director of defendant (Record p. 94).

## FIRST POINT.

THIS COURT IS WITHOUT JURISDICTION OF THE CASE, WHICH SHOULD HAVE BEEN CARRIED TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

A direct appeal to this Court from a circuit court under the 5th section of the Court of Appeals Act (26 U. S. Stat., 826) is never allowed under the present practice unless the question of jurisdiction, which was the reason for the dismissal of the case, was a question of the jurisdiction of the lower court as a court of the United States and not a question of its jurisdiction under its general authority as a judicial tribunal. That is to say the word "jurisdiction" in the section of the act referred to is used in the limited and

qualified sense of the jurisdiction of the lower court as a federal court as distinguished from its jurisdiction generally as a judicial tribunal.

The case of Louisville Trust Co. vs. Knott, 191 U. S., 225, was taken by direct appeal to this Court under the 5th section of the Judiciary Act of 1891, as involving a question of jurisdiction. The case was dismissed by this Court for want of jurisdiction, upon the ground that the appeal should have been taken to the Circuit Court of Appeals, inasmuch as the jurisdictional question in the case did not involve the jurisdiction of the lower court as a federal tribunal to hear the case. At page 233, the Court, after discussing the facts in the case, said:

> "In all this there was nothing involving the jurisdiction of the circuit court as a federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

The Louisville Trust Company case is of further importance from the fact that it overruled the decision in the case of *Shield* vs. *Coleman*, 157 U. S., 168. The Shields case is relied on by the plaintiff in error as showing his right to come direct to this Court in the case at bar. This Court, however, in the Louisville Trust Company case held that the appeal in the Shields case direct to this Court should not have been permitted for the reason that the jurisdictional question in that case in the lower court was not as to the jurisdiction of the court as a federal court. At page 236, Judge HARLAN, in speaking of Shields vs. Coleman, said:

> "It is proper to observe that this court in Shields v. Coleman, 157 U. S., 168, 177, assumed jurisdiction upon direct appeal from a circuit court in a case involving the question whether that court had authority to appoint a receiver of property which was at the time in the possession of a receiver appointed by a state court. As the federal court had, in that case, taken property out of the physical possession of a receiver of the state court, this court expressed its views upon the question whether the possession of the state court should have been disturbed

by the federal court, and it rendered judgment accordingly. *But the precise question here presented as to the jurisdiction of this court under the act of 1891, on direct appeal from the circuit court, was not there raised or considered.* In *United States* vs. *More*, 3 Cr., 159, 172 (1805), it was held that this court was without jurisdiction, under the law as it then was, to review the final judgment of the circuit court of the District of Columbia in a criminal case. It was suggested at the bar, in that case, that this court had, in a previous case, exercised appellate jurisdiction in a criminal case. Chief Justice MARSHALL met that suggestion by saying: 'No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.' To the same effect, substantially, are *United States* vs. *Sanges*, 144 U. S., 310, 319, and *Cross* vs. *Burke*, 146 U. S., 82.

"*In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the fifth section of the Judiciary Act of 1891.*"

In *Bache* vs. *Hunt*, 193 U. S., 523, the question was again raised, and it was held that,—

> "The question of jurisdiction which the act of March 3, 1891, provides may be certified direct to this Court must be one involving the jurisdiction of the circuit court as a federal court and not in respect of its general authority as a judicial tribunal" (Syllabus).

In the very late case of *Courtney* vs. *Pradt*, 196 U. S., 89, decided by this Court on January 3, 1905, the action was commenced in the state court and removed into the federal court upon the ground of diversity of citizenship. After the case had been removed into the federal court, the defendant appeared specially and moved to dismiss the case for want of jurisdiction upon the ground that the court had no jurisdiction of the person. At the time the motion to dismiss the case was heard, a motion was also made to remand the case to the state court. The circuit court overruled the motion to remand and sustained the motion to dismiss, and a judgment was entered "dismissing the suit for want of jurisdiction." No certificate of the question of jurisdiction was granted. An appeal was taken

direct to this Court, and the appeal dismissed for want of jurisdiction upon the ground that the question of jurisdiction in the lower court was one of the general authority of that court as a judicial tribunal, and not one of its jurisdiction as a court of the United States. In the course of the opinion, Mr. Chief Justice FULLER, said at page 91:

> "It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal. * * *
>
> "And the general rule is that the certificate is an absolute pre-requisite to the exercise of jurisdiction here (*Maynard* vs. *Hecht*, 151 U.S., 324). Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as equivalent to the formal certificate. * * *
>
> "No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. *No single and definite issue as to the jurisdiction of the circuit court as a federal court is presented.*
>
> "The case was dismissed for want of jurisdiction over it, as a suit against a

foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; or the sufficiency of the service of *mesne* process to authorize the recovery of personal judgment. * * * *It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the federal courts as contra-distinguished from the state courts.* It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called upon to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5."

It is very difficult to see what distinction can be drawn between the present case and the Courtney case just cited. Both were removal cases; in both a motion was made to dismiss the case for want of jurisdiction of the person of

the defendant; in both a motion to remand was made and argued with the motion to dismiss; in both the motion to remand was denied, and the motion to dismiss granted; in both no certificate of the question of jurisdiction was granted by the court below; in each judgment was entered dismissing the case for want of jurisdiction over the defendant by the service of process in the case. The similarity between the two cases is certainly extraordinary, and we know of no ground of distinction between them.

If, therefore, in the Courtney case the dismissal of the suit on the ground that the service of process was not of such a character as to give the lower court jurisdiction, did not create a right of direct appeal to this Court for the reason that such a question of jurisdiction was not within the meaning of the word "jurisdiction" as used in the 5th section of the Court of Appeals Act, it would seem to follow that the present case could not come direct to this court for the same reason. Further than that if no direct appeal would lie in the Courtney case upon the ground that the motion to remand was not "rested on the contention that there was a lack of jurisdiction in the federal courts as contra-

distinguished from the state court," the same result must follow in the case at bar as the grounds for the motion to remand the present case were merely technical and there was never any claim that there was no "power of the circuit court as a court of the United States to hear and determine the case." It would seem therefore as if the present case was controlled by the decision in the Courtney case and must be dismissed for want of jurisdiction.

It is clear that the court below as a court of the United States had jurisdiction of the case at bar. It was between citizens of different states. The amount involved was over two thousand dollars. It was a case of which the federal court would have had original jurisdiction. It was a case, therefore, that the defendant, being a non-resident, was entitled to remove and try in the federal court. The motion to remand did not deny this. It did not put in issue the power of the lower court, as a court of the United States, to hear and determine the case. It simply sought to prevent the trial of the case in the federal court on various technical grounds which will be found stated in the brief of plaintiff in error as follows:

1. That the defendant in error had waived and was estopped from asserting any right which it had to remove the case to the federal court (brief of plaintiff in error, p. 40).

2. That there was laches in filing the petition on removal (brief of plaintiff in error, p. 53).

3. That the state court was not in session at the time of presentation of petition and bond (brief of the plaintiff in error, p. 87).

4. That the petition for removal was insufficient (brief of plaintiff in error, p. 87).

It is to be noticed that nowhere is the point made in the lower court that the motion to remand should be granted upon the ground that there was a lack of jurisdiction in the federal court as distinguished from a state court. The whole motion was based on technicalities, which at the most, would have given the plaintiff in error the right to take the case to the Circuit Court of Appeals, and to have it there determined whether his technical objections were sound. He only had the right to come to this Court direct upon the ground that the motion which he had made to remand put in issue the power of the

lower court as a court of the United States to hear and determine the case. None of the questions—of the time of filing petition and all the other technical questions raised by the plaintiff in error on the motion to remand—go to the jurisdiction of the court as a court of the United States. They are simply formal and technical questions and not jurisdictional ones. This is well brought out by Mr. Justice GRAY, in *Powers* vs. *Chesapeake & Ohio R. R. Co.*, 169 U. S., 92, 98, where he said:

> "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. * * * But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice BRADLEY, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel."

In the present case there is no certificate as required by the Circuit Court of Appeals Act. It is necessary, therefore, to see if in the application for the writ of error, or in the judgment, or anywhere else in the record, there is definitely

presented any issue as to the jurisdiction of the court below *as a federal court.* The judgment of dismissal (Record pp. 78–79), does not so show. With the exception of the recitals, the judgment reads as follows:

> "It is hereby ordered and adjudged that this cause be and the same is hereby dismissed for want of jurisdiction of the defendant."

The writ of error was allowed, as stated in the order of allowance,

> "solely upon the question of the jurisdiction of the court as prayed for in said petition to review the question of the jurisdiction of the court in said petition mentioned, which is the only question arising herein" (Record, p. 114).

These citations from the record are relied on by plaintiff in error as rendering unnecessary the certificate as to jurisdiction required by the Act of Congress and the practice of this court. Neither quotation shows that the jurisdictional ground upon which the case was dismissed was that the court as a federal court had no jurisdiction of the case. It therefore appears that nowhere in the record was such question plainly

stated or even hinted at. This of course could hardly be otherwise, inasmuch as the case was dismissed by the court below in an exercise of its general authority as a judicial tribunal, and not for the reason that the court as a federal court did not have power to try the case.

We, therefore, find in this case no certificate as required, and nothing in the record which takes the place of such certificate. That is to say, if there had been a certificate, it would have been necessary for it to show that the case was dismissed by the court below for want of jurisdiction of such court as a federal tribunal, and in the absence of such certificate, it is certainly necessary to find some statement in the record (beyond the mere statement that the court dismissed the case for want of jurisdiction) which would show that the ground of dismissal was because the court had no jurisdiction of the action as a federal tribunal, and not merely for the reason that it had no jurisdiction as a judicial tribunal.

As we understand the practice, it is necessary that the certificate, or the record in the absence of the certificate "affirmatively show that the trial court sends up for consideration a single

definite question of jurisdiction" (*Shields* vs. *Coleman*, 157 U. S., 168, 177), and that under the later decisions of this Court such question of jurisdiction must be of the jurisdiction of the court as a court of the United States, and not of its general authority as a court. In the absence of such certificate, or of any such statement in the record, it would seem under the authorities that this case must be dismissed for want of jurisdiction.

In the brief of plaintiff in error, he refers at page 40 to the case of *Shepard* vs. *Adams*, 168 U. S., 618, as an authority for the proposition that the question of whether or not a court acquired jurisdiction by a proper service of process can be reviewed by this Court upon writ of error direct to the circuit court. He also refers on the same page to *Powers* vs. *Chesapeake & Ohio R. R. Co.*, 169 U. S., 92, to show that the question whether a lower court has jurisdiction, upon the ground that the case has not been duly removed from a state court, can be reviewed by this Court upon writ of error direct to the circuit court.

An examination of the Shepard case will disclose that there was no discussion by this

Court of the proposition that the only jurisdictional question, which could be taken direct from the circuit court to the supreme court under the Circuit Court of Appeals Act, must be whether the court had jurisdiction as a court of the United States or as a federal tribunal. It will also appear from an examination of the Powers case that this question of jurisdiction as it is now understood by this Court was not there considered.

The Shepard case and the Powers case, if inconsistent with the doctrine of *Courtney* vs. *Pradt* (decided January 3, 1905), must be deemed to be overruled by the latter case for the two questions involved in the Shepard and Powers cases were directly raised in the Courtney case and it was held that this Court had no jurisdiction in such cases of a direct appeal under the 5th section of the Act of 1891. Further than that, all cases decided prior to the case of the *Louisville Trust Company* vs. *Knott*, 191 U. S., 225, which are inconsistent with the doctrine there laid down, must be deemed to have been reversed, when this Court declined to follow its decision in the Shields case upon the ground that the question of jurisdiction as now understood by this Court was not raised

therein, viz.: that the jurisdiction meant in the Circuit Court of Appeals Act, which gave a direct appeal to this Court, was the jurisdiction of the lower court over the case as a federal tribunal, and not as a judicial tribunal. In other words, when this Court, in the Louisville Trust Company case, reversed the decision in the Shields case, and held that the appeal in the latter case should have been to the Circuit Court of Appeals and not direct to this Court, it reversed all the other cases which had been previously permitted to be brought direct to this Court, in which the jurisdictional question in the lower court was not as to the jurisdiction of such court as a federal court.

In other words, as we understand the case of *Louisville Trust Co.* vs. *Knott*, it was the intention of this Court to there lay down the new rule as to the true meaning of the word "jurisdiction," as used in the 5th section of the Circuit Court of Appeals Act, in such a way that thereafter there could be no mistake as to the kind of a case which could come direct to this Court from the circuit and district courts. As was said by Mr. Justice HARLAN at page 236:

> "In the circumstances of the present case and to avoid misapprehension in the

future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the fifth section of the Judiciary Act of 1891".

Under the definition as given in the Louisville Trust Company case, it is clear that this Court has no jurisdiction of the present case, and any authorities which may indicate that previously such cases were allowed to be brought direct to this Court must be taken to be overruled by the later cases and the present practice which is, that no case can come direct to this Court on the question of jurisdiction except where the jurisdiction is alleged to have been improperly exercised or denied upon the ground that the court below had or did not have jurisdiction as a federal court, as distinguished from its general jurisdiction as a judicial tribunal.

The rule is now distinctly declared by this Court in its later decisions as to what questions of jurisdiction can be brought direct from the circuit and district courts, and not to dismiss this case under such later decisions would be to throw the whole subject into confusion.

We therefore respectfully submit that this Court has no jurisdiction of the case at bar under

the ruling in *Courtney* vs. *Pradt*, upon the following grounds:

(1) That the case was not dismissed in the court below upon the question of want of jurisdiction of the court as a court of the United States, but of its want of jurisdiction of the defendant under its general authority as a judicial tribunal.

(2) That the motion to remand was made upon technical grounds, and that there was nothing to indicate that it rested (as in fact it did not) on the contention that there was a lack of jurisdiction in the federal court as contra-distinguished from the state court.

## SECOND POINT.

THE MOTION TO REMAND WAS PROPERLY DENIED.

In case the Court should not agree with the first proposition in this brief that it is without jurisdiction of the case for the reason that the dismissal of the action for want of the service of the summons upon the defendant was not a question of the jurisdiction of the court below as a court of the United States, but in respect of its general authority as a judicial tribunal, and for the further reason that the motion to remand was not rested on the contention that there was a lack of jurisdiction in the federal court as distinguished from the state court, and did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, it is then necessary to take up the merits of the case.

It is to be noticed that the plaintiff in error in his brief places his chief claim to a reversal of the judgment below upon the fact that the motion to remand was denied, and he says very little with reference to the decision of the Court below upon the motion to set aside the service of

the summons. We shall therefore discuss first the questions arising under the motion to remand.

I.

In substance the sole ground of the motion to remand was that the defendant below had lost the right of removal by reason of a default in appearing, which was subsequently relieved by the court. The defendant had appeared specially in the case for the purpose of making a special motion, which it could not do, if a general appearance had been filed. In order to protect its rights, it had obtained an extension of time in which to file a general appearance if the special motion, which it had made, should be denied and it decided not to appeal (Record, p. 72). Such special motion was denied and the defendant determined to appeal. After the decision of the special motion, and before the appeal, the time of the defendant to appear generally had expired, its attorney assuming that he had *twenty* instead of *ten* days after the determination of the motion in which to appear generally. This inadvertence, which was undoubtedly caused by the illness of defendant's attorney (Record, p. 102), was remedied by the court when called to its attention and the default opened.

As said before, the entire motion to remand comes to this one question, whether a defendant inadvertently in default for a few days as to the filing of a general appearance, is, when relieved from that default, deprived of his right to remove to the federal court, if such right is his in every other respect. It is to be noticed that the default here was not a default in answering, and that the time to remove had not thereby expired. The defendant had the right to remove up to the time when required to file its answer, or some pleading in opposition to the complaint. No complaint had been then or has ever been filed in the case. The opening therefore of the default in appearing generally placed the defendant in the position in which he was before, so far as his right of removal was concerned.

The only case in which the precise point has been passed upon by the courts is *Dantel* vs. *Goodyear Shoe Machinery Company*, 106 Fed. Rep., 551. While the case was pending in the state court, the defendant made default in appearing. Subsequently the defendant was relieved from such default, and afterwards removed the case to the federal court. A motion was

made by the plaintiff to remand the case upon the ground that the defendant by its default had lost the right of removal. The motion was denied and the opinion of Judge LACOMBE was as follows:

> "Motion to remand is denied. Service of summons without complaint did not set running the time within which, by the laws of the State, defendant is required 'to answer or plead to the declaration or complaint of of the plaintiff.' Wisely so, because until complaint is served defendant may not be able to determine what cause of action plaintiff asserts—information which may be important to the decision whether he will or will not remove. Extension of time to answer (after default, when summons had been served) extended time to remove in this circuit, *and right of removal was never lost.*"

In *Cady* vs. *Associated Colonies*, 119 Fed. Rep., 420, an action was commenced in the state court of California on the 27th day of February, 1902. The defendant defaulted in entering its appearance and a judgment by default was entered in the state court on April 2, 1902. On September 20, 1902, the defendant appeared by counsel in the state court and filed a motion

with the clerk to vacate and set aside the default and judgment and to quash the summons. Upon the same day, the defendant removed the case to the federal court. In the federal court, the motion to set aside the summons was granted upon the ground that the corporation did no business in the State of California. In the course of its opinion, the court said, at page 423, as follows:

> "The suggestion of the plaintiff that the case be remanded to the state court to have this motion determined cannot be entertained. This court cannot abdicate its authority or duty in any case in favor of another jurisdiction. Moreover, the appearance of the defendant in the state court, under the circumstances, was not a waiver of objection to the jurisdiction. * * * But the authority of this court to determine whether the state court had jurisdiction of the defendant to make the order and enter the judgment contained in the record has a wider scope than the power conferred upon the state court to set aside defaults, as provided in section 473 of the State Code of Civil Procedure."

It is to be noted that the foregoing case was

removed to the federal court at a time when the defendant was in default and had been in default for many months, and a judgment of default had been actually entered against it and had not been set aside at the time of removal. In other words, in the case at bar, the question of whether the defendant was for a day or two inadvertently in default in appearing (not answering) had nothing to do with its right to remove the case to the federal court and a relief from such default in no proper sense extended its time to answer any more than it extended its time to serve a notice of trial or to take an appeal to the Court of Appeals.

## II.

### THE PETITION AND BOND ON REMOVAL WERE FILED IN TIME UNDER ANY ASPECT OF THE CASE.

This Court held in *Powers* vs. *Railroad Co.*, 169 U. S., 92, that no party to a controversy in the state court could remove it to the federal court so long as there "*does not appear of record to be any removable controversy*" (p. 100), and further held that a defendant could remove to the federal court a controversy not originally appearing of record to be a removable action, when-

ever it became on the record a removable cause, even though the time of the defendant to answer had then expired. The ground of the decision being that "*the time of filing a petition for removal is not essential to the jurisdiction;* the provision on that subject being in the words of Mr. Justice BRADLEY, 'but modal and formal'" (p. 98):

The Court, in discussing the question, said at page 100:

> "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. *But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it,* and the provision of the act of Congress, that 'any party entitled to remove any suit,' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases. * * *

> "The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, *is to hold that* the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

In *Speckart* vs. *Bank*, 85 Fed. Rep., 12, it was held that

> "The provision * * * that a petition for removal of a cause may be filed at or before the time required for answering or pleading, is modal and formal, and does not operate to prevent a removal, where the cause does not become a removable one until after that time has expired" (Syllabus).

In the case of *Fogarty* vs. *Southern Pacific Co.*, 121 Fed. Rep., 941, the action was not at the time it was brought removable, but subsequently became so. It was held by the court that the

application for removal having been granted nineteen days from the time when the right of removal arose, was in time. The syllabus of the case is as follows:

> "The motion for removal having been granted nineteen days from the dismissal will be held to have been made within a reasonable time after the right of removal arose, though it did not appear when the moving party learned of his right to remove, or when the petition for removal was filed."

In *Guarantee Co.* vs. *Hanway*, 104 Fed. Rep., 369, it was held:

> "Where a case is not removable when the time for its removal prescribed in the acts of Congress expires, but subsequently becomes removable by amendment or otherwise, the filing of a petition and bond for removal within a reasonable time thereafter entitles the petitioner to a transfer of the case to the federal court."

It will be noticed that Mr. Justice GRAY in his opinion in the Powers case makes the point that no party can remove a cause "so long as there does not appear of *record* to be any removable controversy." This was the situation in the present case. There did not appear of record

to be a removable controversy in this action, until the affidavit of Hiram Remington, verified October 16, 1903, was served upon the attorney for the plaintiff on October 23, 1903. The defendant then most promptly and as soon as it was able to prepare a petition on removal applied to the state court to remove the case (Record, p. 102). Under the ruling, therefore, in the Powers case, the defendant lost no right of removal by anything which transpired in the action prior to its appearing on the record to be a removable controversy. We therefore can banish from the discussion of this question all the argument of the plaintiff and all his authorities based upon anything which took place before October 23, 1903, when for the first time, the action became, on the record, a removable controversy.

In view of the Powers case, the whole question comes to this;

Can a defendant lose the right to remove a cause clearly within the jurisdiction of the federal court on account of a circumstance which occurred before the action became a removable controversy?

On Saturday, October 24, 1903, the default of defendant in error was relieved and the order entered in state court on October 26.

On Friday, October 23, 1903, the present action first became on the record therein a removable controversy. On Monday, October 26, 1903, the case was removed to the federal court. Is it possible to seriously argue that the right of removal had been lost by a default in appearing which inadvertently took place before the right of removal existed. How can a right be lost at a time when it did not exist?

There is no authority so far as known and the other side has certainly referred to none which holds that a defendant has not removed his case in time, because he has made an inadvertent default in appearing at a time when the cause was not removable to the federal court. No other line of authorities is in point in the case at bar.

The case became a removable controversy on October 23, 1903. The time of the defendant to answer had not even begun to run when on the 26th of October, 1903, the petition and bond were filed. It would seem to be a simple case of an action between citizens of different States involving more than two thousand dollars in which the application for removal was made before the time of the defendant to file any pleading in opposition to the complaint had expired.

The plaintiff in error has tried on page 82 of his brief to confuse the real question by suggesting that the defendant was in default on October 26, 1903, because of the fact that the order of the state court entered on October 26, 1903, was initialed by the Judge on October 24, 1903. There is no room for discussion in this regard as it is settled by the state courts that an order takes effect from the day of filing in the Clerk's office.

In *Wilcox and ano.* vs. *National Shoe & Leather Bank*, 67 App. Div., 466 [1902], the bank, the day after an order was made appointing Receivers of the corporation, but before the order had been entered in the County Clerk's office, applied the balance standing on its books to the credit of the corporation upon a note made by the corporation and held by the bank, which fell due on that day. It was held that the order took effect from date of *entry* in the County Clerk's office. The court reviewed the authorities, and said as follows, at page 468:

> "It seems to have been assumed, without dispute, in all the cases which have come under our observation, that *the entry* of a court order under direction was a necessary

step in the perfection of that order. * * * And so through many other cases it has always been assumed that the ultimate act perfecting an order of the court, *so as to make it operative, is its entry*, which, as above remarked, may be the time it is filed with the clerk."

In *Hastings* vs. *Twenty-third Ward Land Co.*, 46 App. Div., 609, the point was raised as to the time at which an order confirming assessments became effective, and the court said at page 611:

"It is quite clear that the order of the court became operative and the report became confirmed on the day *that the order was entered* by the clerk of the court. The initialing of the formally prepared order by the Judge was simply a direction to the clerk to enter the order. Such initialing was unnecessary to make the order valid. A direction of the Judge, either verbally or in writing to the clerk to enter the order, and his entering the order under such direction, was the evidence of the decision of the court, and upon the day *of the entry* of the order the report stood confirmed. The time when the Judge affixed his initials to the order was of no importance. It was his delivery to the clerk of the order, with a

direction to enter the order, *and its entry* by the clerk, which gave it validity."

In *Vilas* vs. *Page*, 106 N. Y., 455, it was said:

"We are of opinion that the order became *effective* as an authority to the Receiver upon its being *filed with the Clerk*."

The great consideration here is that this action was one which the defendant in error under the Constitution and laws of the United States was entitled to try in the federal court. The plaintiff in error has attempted to deprive it of this statutory right upon the very technical ground that in some way it had lost the right of removal by an inadvertent default in appearing, happening before the cause was of record a removable one and cured by the court. Our answer has always been that the defendant in error strictly complied, in making its application for removal, with every requirement of the Federal Act as to the time of application and otherwise, and that in any event in the words of Mr. Justice GRAY, "the time within which a removal must be applied for is not jurisdictional but modal and formal" (169 U. S., 92, 99).

We therefore respectfully submit that the removal was in time under every aspect of this

case, and that the right to remove could not possibly be lost by a circumstance happening at a time when the case on the record was not a removable controversy. A man cannot lose that *which he has not.* A *defendant* cannot *lose* a right of removal at a time when he has no such right.

III.

If the Court should not agree that this whole discussion is ended and settled, by the decision of Judge LACOMBE in the Dancel case cited in subdivision I. of this point, and by the Powers case (169 U. S., 92), in favor of the defendant in error's claim that the removal was in time, we then take up the question independently of those cases.

The petition for the removal of this case from the state court to the federal court states the diversity of citizenship of the parties and that the amount involved is more than two thousand dollars, exclusive of interest and costs, which under the United States Statutes is the jurisdictional amount required to be involved in a case before it can be removed to the federal court for trial. It is important to notice that the plaintiff in error has never in any way contested these two important

and vital jurisdictional facts. It is substantially conceded by him that the case is one which under the statutes of the United States the defendant in error is entitled to try in the federal court and one over which such court would have had jurisdiction if originally commenced therein. He, however, seeks to prevent the trial of the case in the federal court upon the technical ground that the defendant did not exercise its right of removal in time.

The Removal Act of 1888 (25 U. S. Statutes, 433–435) provides as follows:

> "SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court, to the circuit court of the United States, he may make and file a petition in such suit in such state court *at the time, or any time before the defendant is required by the laws of the State, or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff*, for the removal of such suit into the circuit court to be held in the district where such suit is pend-

ing, and shall make and file therewith a bond with good and sufficient surety, for his o· their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

The question which presented itself to the court below upon the motion to remand was whether the time of the defendant to answer or plead to the declaration or complaint of the plaintiff had expired prior to the removal of the case. No complaint had ever been served in the case. It is therefore difficult to see how the time of the defendant to answer or plead to a complaint, which had never been served, could have expired.

On October 2, 1903, an order was entered denying the motion of the defendant to set aside the service of the summons. The appeal from this order was taken October 15, 1903, three days after the time of the defendant to appear generally in the case had expired. This slip of three days was the result of the illness of the attorney for the defendant who had the case in charge (Record, p. 102), and who inadvertently supposed that the time of the extension to appear generally was twenty days instead of ten. This period of three days is the only time when there was any default in appearing on the part of the defendant, and this default in appearing was the one relieved by the court. It was not known that the defendant was in default in appearing at the time the appeal was taken, and it was such a trivial matter that the court instantly relieved the defendant therefrom the moment it was called to its attention.

We urge upon the Court the point that this default, from which the defendant was relieved, was not a default in serving its answer and that the time of the defendant to answer had not expired in any proper sense of the term, and certainly not within the meaning of any authorities

holding that, when a party's right to answer expires on a certain day and the party is in default in serving his answer, such party cannot by obtaining relief from such default enlarge the time to remove given by the Act of Congress and specially required to take place before a certain fixed time. In the present case the time of the defendant to answer had never begun to run, as no complaint had been served. As it had not begun to run, it could not very well expire or be extended. The time of the defendant to serve its answer was no more extended by the order relieving its default in appearing than was its time to serve its case on appeal to the Court of Appeals or to take any other step in the litigation.

The question therefore which now arises is whether such inadvertent default of three days prevented the defendant from removing the case to the federal court when it had been relieved from such default by an order of the state court. In other words, had the time of the defendant in this case to answer or plead to the declaration or complaint of the plaintiff expired? It is certainly not plain how this can be so in view of the fact that the default in appearing (not answering) had been opened, and that when the case was

removed, the defendant was presenting to the Appellate Division by special appearance the question whether the court had jurisdiction by reason of the service of the summons.

As we understand it, the question in the case comes to this:

> Does a defendant by making default in appearing (*not in answering*), which default is relieved by *order* of the court, thereby lose the right of removing the case to the federal court, if the action is otherwise removable and the bond and petition are filed before the time fixed by the State law for serving its answer?

We know of no case which so holds, and the plaintiff in the authorities cited by him refers to no such case. Any authorities to be found as to extending the time to answer after default in answering are not in point. This question would seem to be controlled by the wording of the Act of Congress itself, which provides that the defendant can remove any case of which the federal court would have original jurisdiction, if he makes the application in any stage of the action prior to the time or at the time when he is required to file some pleading in opposition to

the complaint. Now in this particular litigation the answer or any pleading or action in opposition to the complaint has never been due. The time to answer has never even begun to run—has never been put in operation, as the complaint has never been served and the time of the defendant to answer or otherwise plead is twenty days after a service of a copy of the complaint. By the order of the court, entered October 26, 1903, the defendant was relieved from its default in appearing, not of its default in serving its answer, and its time to serve its answer was not extended by the court, except in the most remote sense that the litigation was permitted to continue and the plaintiff was not allowed to take advantage of a slip on the part of the defendant's attorney. Its time to answer was no more affected by the order relieving the defendant from default in appearing than was its time to serve a notice of appeal from a final judgment in the case to the Court of Appeals or a notice of argument in that court.

In other words, when the state court relieved the defendant from a default in appearing generally, the situation was that the defendant had appeared specially in the action and had appealed

to the Appellate Division upon the question whether the service of the summons was a proper one. At the time the appeal was taken the defendant was inadvertently in default in appearing generally. From this default the court relieved the defendant.

The state court certainly had the power to relieve the defendant from its default and to place the litigation in the same situation as if the default had never occurred, and by doing so it did not relieve any default of the defendant in answering, for the reason that the latter had never been in default as to its answer and never under obligation to serve any answer, as no complaint had ever been served, and it had therefore never suffered any default in that regard.

We therefore respectfully submit that it is impossible to twist an order relieving the defendant from default in appearing generally, into an order extending the time of the defendant to answer, after the defendant had allowed the time in which it was permitted to serve its answer to go by.

If the following facts are constantly borne in mind in the consideration of this case, we submit that they mark a clear and certain path through

all the maze of fact and authority contained in the brief of the plaintiff in error:

(1) The case is one clearly within the jurisdiction of the federal court, as the requisite diversity of citizenship exists and the case involves more than $2,000.

(2) "The time within which a removal must be applied for is not jurisdictional but modal and formal" (169 U. S., 92, 99).

(3) The case was not a removable case, so far as the defendant was advised, and was not on the record a removable case until after the appeal from the order denying the motion to set aside the summons and until the affidavit of Hiram Remington, verified October 16, 1903, was served upon its attorneys on October 23, 1903 (*Powers* vs. *Railroad Co.*, 169 U. S., 92).

(*a*) The application to remove was made immediately thereafter.

(*b*) There was no attempt to experiment with the state court. The motion to set aside the summons was originally made in the state court because there was no alternative (the case not then appearing by the record or known to defendant's attorney to be a removable controversy). As soon as it was possible for attorney of defend-

ant to make the necessary allegations in the petition of removal, the case was removed without waiting to see what the state court might decide.

(4) No complaint was ever served. Therefore the time of the defendant to answer never began to run. As it had never commenced, the time to answer had, of course, not expired when the case was removed.

(5) The default of the defendant from which it was relieved was a default in appearing and not in answering.

(6) Such relief from default in appearing did not revive a lost right to answer, as the defendant never had a right to answer which it could lose, for the reason that no complaint was ever served.

(7) The time of the defendant to serve its answer was no more extended by an order relieving it from default in appearing than was its time to serve a notice of trial or of argument or of appeal or to take any other step in the case.

(8) The special appearance in the state court and the motion to set aside the summons was, of course, not in any sense a plea or answer to the complaint, as no complaint had been served.

## Reply to Brief of Plaintiff in Error in Regard to Motion to Remand.

I.

In the second point of the brief of plaintiff in error at page 40, there is an attempt to claim that the defendant by some act on its part had lost the right of removal and was estopped from bringing the case to the federal court. It is not clear just what the plaintiff in error claims to have been improper on the part of the defendant. At the time of removal an appeal had been taken in the state court from the order denying the motion to set aside the service of the summons, and a motion had been made for a stay of proceedings.

This motion was made on October 16, 1903, and was returnable October 24, 1903. Between the date of the notice of motion and of the return, the case became a removable case upon the record. There was certainly no obligation on the part of the defendant to abandon its motion for a stay of proceedings pending the appeal, and its time to remove the case was in no way affected by what it did with reference to such motion. Suppose the appeal had been argued, and the Appellate

Division had sustained the court below and affirmed the order denying the motion to set aside the service of the summons, and the plaintiff had served his complaint, there would have been nothing to prevent the defendant from then removing the case to the federal court for trial. There can be no question as to this inasmuch as the defendant under the New York practice, has twenty days in which to file its pleading, or take some step in opposition to the complaint. Under the federal statute the defendant has until the expiration of such time in which to remove his case. Therefore nothing could have been done on the motion for a stay of proceedings which would affect the right given defendant by the United States statutes to try his case in the federal court. Nothing done in an action in a state court long before the time for removal has expired can affect or take away such right. The only requirement of the federal statute is that the application for removal shall be made before the time to file the answer has expired. If this is done it is no concern what steps the plaintiff may have taken in the state court before such time.

The many authorities referred to on page 41

of the brief of the plaintiff in error seem to have no application in the case at bar.

*Case* vs. *Olney*, 106 Fed. Rep., 433, does not seem to touch the question in controversy here. There a demurrer had been filed to the complaint. The words in the Removal Act "to answer or plead to the declaration or complaint" have been construed as including the filing of a demurrer. The demurrer in the Olney case was filed April 3, 1900. The petition for removal was not filed until June 19, 1900. It was very apparent there that the time to answer the complaint had long since expired, as the longest period allowed by the state court was thirty days from the date of the service of the summons, and assuming the demurrer which was filed April 3, 1900, to have taken the place of the service of the summons, because of the voluntary appearance of the defendant for the purpose of filing the demurrer, it was clear that the time to file the petition for removal expired thirty days after April 3, 1900, and long before the filing of the petition on June 19, 1900.

The case of *Chicago I. & N. P. R. Co.* vs. *Minnesota & N. W. R. Co.*, 29 Fed. Rep., 337, arose under the old Act of Congress of 1875, and

the only question there was whether the defendant could carry on the action both in the federal court and also in the state court upon an appeal from an adverse decision on an application for a writ of injunction. It was held that he could not, and that as he had elected to continue in the state court after removal to federal court, the whole case must go there.

The case of *Hanover National Bank* vs. *Smith*, 13 Blatchf., 224, would seem to have nothing to do with the question here at all. The case arose under the old Act of Congress of 1875 which required the defendant to remove the suit before or at the term at which said cause could be first tried and before the trial thereof. The defendant applied for a postponement of the case when it was moved for trial and could have been tried. The court refused to postpone it, unless the case was referred. The defendant agreed to refer the case and then, after obtaining a postponement of the case, made an application to remove it to the federal court. It was held on a motion to remand that the time of removal had expired, inasmuch as the case had been called for trial and would have been tried, except for the adjournment obtained upon the statement of the defendant's counsel.

It is not clear how plaintiff's counsel can consider that the Hanover Bank case has any application in the present controversy, inasmuch as the motion to stay the proceedings in the case at bar pending the appeal was noticed long before the case was known to be a removable one, and because the application for a stay of proceedings has nothing whatever to do with an extension of time of defendant to answer to the complaint. Certainly a relief from a default in appearing can not be turned into an extension of time to answer, after a default in answering, as the time of the defendant to answer in this case had not even begun to run (no complaint having been filed), and, therefore, could not by any possibility have expired.

Certainly the defendant has done nothing in the state court by which he has secured any benefit which would prevent him from asking for a removal of the case. It may be that under certain circumstances, where a defendant's time to remove a case has expired, and he then obtains an extension of that time by some act on his part, he will be estopped by such act from removing the case, for the reason that the court would not have granted his request, if it had

understood the purpose thereof. This however is not the situation in the case at bar, as the time of the defendant to remove the case under the federal statute had not expired and not then begun to run, and would not begin to run until a complaint was served, which was not then done and has never since been done in the case.

The case of *Manning* vs. *Amy*, 140 U. S., 137, does not seem to touch the question at all. In that case there was an alternative or conditional application for removal, and of course such an application cannot be deemed to be within the provisions of the Removal Act.

II.

The third point of the brief of plaintiff in error, with reference to laches in filing the petition for removal is not very clear. It is difficult to see how there can be any laches in filing the petition when the time to file it, under the federal statute, was still open and would be until twenty days after the service by the plaintiff of a complaint. Until such time, there certainly could be no laches in filing the petition. A person can hardly be guilty of laches in the

filing of a paper if he files it before his time to do so has expired.

The cases referred to at the bottom of page 65 of the brief of counsel for the other side are cases in which the time of the defendant to answer had expired by default. These cases simply held that under such circumstances, where the right to remove had been lost, it could not be revived. This is not the situation in the present case. The time to answer had not expired in this case, and had not even begun to run at the time it was removed to the federal court, as no complaint had then been served.

III.

It is not exactly apparent what the fifth point of the brief of plaintiff in error has to do with the matter. When the case became removable has very little to do with the right of the defendant to remove it, and with the time of the defendant in which to make the application, so long as the time to remove had not expired. Even if it had been proper to remove the case upon the service of the summons, yet it did not mean that because of the right to make such removal, it must be done before the time for it to answer the complaint had expired.

The cases of *Coffin* vs. *Philadelphia W. & B. R. Co.* 118 Fed. Rep., 688, and *Zinkeisen* vs. *Hufschmidt*, 30 Fed. Cas., 933, cited on pages 70 and 71 of the brief of plaintiff in error, are hardly logical. If the claim of the plaintiff in error was not in excess of $2,000 the federal court would not have original jurisdiction of the cause. If the federal court had no original jurisdiction of the cause, it was not a removable case. Whether the case does involve more than $2,000 depends upon the claim of the plaintiff. If he sees fit to claim less than that, although he might have made a larger claim if he chose, the case is not within the original jurisdiction of the federal court and therefore not a removable case.

These two cases not only have nothing to do with the question in controversy, but would seem to be in conflict with the Powers case which expressly held, that "so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it" (169 U.S., 92, 100).

At page 77 of the brief of plaintiff in error, it is claimed that the petition for removal is insufficient in its allegations. Our only answer to this is that the petition, as will be seen from

reading it, complies in every respect with the requirements of the Removal Act.

## IV.

It is objected at page 87 of the brief of plaintiff in error that there was no presentation of the petition and bond to the state court in session. If there was anything in this point, it would mean that few cases in the country districts of the various states could be removed to the federal court, as for long periods of time, the state court is not in session. It cannot be that the constitutional right of a defendant to try his case in the federal court is to be determined to any extent by whether a state court is actually in session. If on a given day, his time to file the petition and bond expires under the federal act, he surely cannot lose the right to bring the case into the federal court, because of the fact that no state court is in session, and he is unable to present the petition and bond in open court.

As we understand it the petition in this case was presented to the state court within the meaning of any requirement of the Removal Act, and by it received. Judge ROGERS endorsed on the petition the following words (Record, p. 3):

"Read on application, Oct. 26, 1903, W. M. R., J. S. C."

At the same time the bond was approved by the court, both as to form and the sufficiency of securities, and the Judge endorsed thereon the following "I hereby approve of the within bond as to form and sufficiency of surety, dated October 26, 1903, WATSON M. ROGERS, J. S. C." (Record, p. 6). The petition and bond were then filed in the Clerk's Office.

The Removal Act provides as follows:

> "That whenever any party * * * may desire to remove such suit from a state court to the circuit court of the United States *he may make and file* a petition in such suit in such *state court*, * * * and shall make and file therewith a bond with good and sufficient surety."

It will be observed that the act does not require the presentation to the court, but simply the filing of such petition and bond. It is not clear how there could be under the practice of the State of New York, any filing, except the filing in the Clerk's Office.

It is, however, unnecessary to argue this proposition for the reason that the presentation to

Judge ROGERS, a Justice of the supreme court of the state, was certainly a fulfillment of the requirements of the Removal Act, and no case is cited by the other side in which an action has been remanded to the state court for the reason that the petition and bond were presented to a Judge in Chambers and not in open court. It is true that counsel for the other side refers to the case of *Williams* vs. *Mass. Ben. Assn.*, 47 Fed., 533, in which a motion was made by the defendant to compel the plaintiff's attorney to receive the *defendant's answer*, and that that motion was denied by Judge Cox upon the ground that the case had never been removed into the federal court, but was still in the state court. That was not a motion to remand and the facts there were peculiar and have no resemblance to the present case, as the state court to which the application was made declined to receive the petition and bond, the Judge stating that the bond was defective and that he had no power to act upon the application. In the present case the court to which application was made acted upon the application and accepted the petition and bond as required by the Act of Congress. We think, therefore, that the Williams case referred to by

the other side is of no importance here, because in the first place, it did not arise upon a motion to remand, and in the second place, the state court to which the application was made declined to grant it, the Judge stating that the bond was defective and that he had not the power to receive the application.

In any event the decision of Judge Cox referred to by the plaintiff must be deemed to be overruled so far as the Northern District of New York is concerned, by a subsequent decision of Judge WALLACE in the case of *Noble* vs. *Mass. Benefit Assn.*, 48 Fed. Rep., 337. This case came before the court on a motion to remand, and Judge WALLACE in the course of his opinion, stated as follows at p. 338:

> "In my judgment, notwithstanding recent opinions to the contrary by judges whose views are entitled to great weight, *it does not require the removing party to present his petition or bond to a judge, either in vacation or in open court, but is satisfied when he files them with the official custodian of the records of the court.* The statute requires him to make and file a petition and bond 'in the suit' in the state court. It does not, in terms, require him to make any other pre-

sentation of them to the court; and if he moves the consideration of the court, or of a judge, upon them, his rights are not enlarged or abridged by the action of the court or judge. The statute requires the state court to 'accept' the petition and bond, and 'proceed no further in the suit.'" * * *

"Certainly it is the decorous practice for the removing party to present his petition and bond to the judge of the state court, and obtain the formal acceptance of the court. It is also the safer practice, because he can thereby have an opportunity to obviate any remediable objections which are suggested to their sufficiency in case the court refuses to accept them. *But this is not indispensable*, and when they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further, if they are sufficient."

It is to be noted that we followed the decorous practice suggested by Judge WALLACE of presenting the "petition and bond to the Judge of the state court."

In *Loop* vs. *Winters' Estate*, 115 Fed. Rep., 362, it was held, following the decision of Judge WALLACE:

"It is not essential to the removal of a cause that an order therefor should be made by the state court; the filing of a sufficient petition and bond effects the removal without any action of the Court." (Syllabus.)

## THIRD POINT.

THE JUDGMENT OF THE COURT SETTING ASIDE THE SERVICE OF THE SUMMONS WAS RIGHT.

The only affidavits filed upon the motion to set aside the service of the summons are the affidavits of J. C. Stubbs, the director of the defendant with whom the summons was left, of Henry Purcell, the attorney in this action for the defendant, and of Maxwell Evarts, the counsel for defendant. In the affidavits of Stubbs (Record, p. 74) and Evarts (Record, p. 103) it is stated positively and unequivocally that the defendant has done no business within this State, and has had no property or office within this State, since the 29th day of July, 1899. These affidavits are not upon information and belief, but on the knowledge of the affiants themselves. These statements are further strengthened by the fact appearing in both affi-

davits that the Central Pacific Railroad Company, on July 29, 1899, conveyed to the Central Pacific Railway Company, a corporation organized under the laws of Utah, all of the property and assets of the Central Pacific Railroad Company (see Appendix, p. 1).

This was done in pursuance of an arrangement entered into in accordance with the provisions of the Act of Congress, approved July 7, 1898, by which a commission was appointed for the purpose of negotiating an adjustment of the affairs of the Central Pacific Railroad Company.

The plaintiff in error filed no affidavits in opposition to the motion in the court below and possibly relied on affidavits filed in the state court. In none of the affidavits filed in the state court does it appear that the plaintiff claims that the defendant is doing business within the State of New York, nor is there any real contention that the defendant has any property in said State, as the suggestion can hardly be treated seriously that a suit brought by one Walter Morshead, a stockholder holding 100 shares of the stock of the Central Pacific Railroad Company against the estate of Collis P. Huntington seeking to recover some one hundred and

twenty-five millions of dollars from his executors can be considered property within New York State of the Central Pacific Railroad Company. This is the sole suggestion that there is within the limits of the State of New York any property of the defendant. If every action brought by a stockholder against third parties in whatever State of the Union it may be brought can be construed to be the property of the corporation in that State, it certainly should be limited to cases in which final judgment had been obtained in such action. Even if such an action could be given serious consideration and be thought of as the property of the defendant in this case, then certainly it would have passed under the conveyance from the Central Pacific Railroad Company to the Central Pacific Railway Company, which latter company acquired all the property and assets of the defendant in error.

By the agreement between the Central Pacific Railroad Company and the Central Pacific Railway Company of July 29, 1899 (Exhibit "A" attached to affidavit of Maxwell Evarts, verified November 25, 1903, and printed at p. 1 of the appendix to this brief), the Central Pacific Rail-

road Company after conveying to the Central Pacific Railway Company certain specified properties made an assignment and transfer to the latter company of

> "ELEVENTH. All other properties, claims, demands, moneys, chooses in action, leaseholds, rights, privileges and franchises owned by or belonging to the party of the first part or to which it is in any wise entitled."

This conveyance was entered into in pursuance of an agreement between the United States of America, the Central Pacific Railroad Company and Messrs. Speyer & Company, dated February 1, 1899 (Appendix to brief, p. XIII). From this transfer, it is clear that if the claim of Morshead against the Huntington estate could possibly be considered property of the Central Pacific Railroad Company, it was transferred to the Central Pacific Railway Company at the time of the conveyance of July 29, 1899.

The unequivocal statements of Stubbs and Evarts, not on information and belief, but of their own knowledge, that the Company has no office in the State of New York, must, we think, be given greater weight than a statement on information and belief made by a process server,

who had been making investigations in the office of the Southern Pacific Company at the request of the plaintiff in this case, and who was unable to swear to anything more than the following:

> "That he proceeded on that day with said summons in his possession to the office of the Southern Pacific Railroad Company, at 120 Broadway, Manhattan, New York City, *which said office was also the office of the Central Pacific Railroad in New York*, and made inquires in said office for J. C. Willcutt, the Secretary, and N. T. Smith, the Treasurer, of the said Central Pacific Railroad Company, but that deponent was there informed that neither said Willcutt nor said Smith were in New York, but that they resided and had their places of business in the City of San Francisco, in the State of California" (Affidavit of Andrew Hunter, June 8, 1903, Record, p. 87).

The statement of Andrew Hunter, not even on information and belief, is supposed to be corroborated by the statement of Ellis L. Aldrich to the following effect:

> "That on or about the 6th day of April,

1903, deponent sent Andrew Hunter, whose affidavit is hereto attached, to inquire at the office of the Southern Pacific Railroad Company, *which is also the office of the Central Pacific Railroad Company*, for J. L. Willcutt and N. T. Smith, but that the said Andrew Hunter was there advised that the said Willcutt and Smith were not expected in New York and that there was nothing to bring them here; that they very seldom came to New York" (Record, p. 49).

Mr. Aldrich also made an affidavit on May 15, 1903. After referring to the service by him of the summons upon Mr. Stubbs he said:

"That deponent has also called at the office of the Southern Pacific Railroad Company in the Borough of Manhattan, City of New York, and was there informed that that was also the office of the defendant Central Pacific Railroad Company. That deponent was further informed at the said office that none of the officers of the defendant Central Pacific Railroad Company resided or had his place of business in the State of New York, but that all the officers of the said Central Pacific Railroad Company resided and had their places of business in the

western part of the United States" (Aldrich Affidavit, May 15, 1903, Record, p. 87).

The statements of these process-servers, not even made upon information and belief, can hardly be considered as against the clear, certain and unequivocal statement of a director of the company that it has no office in New York. Mr. Remington, however, upon his own affidavit, disposes of the matter. He says as follows:

> "That the defendant had an office for the transaction of business of said corporation, in the City of New York, State of New York *until in or about the year 1900.*" (Affidavit of Frederick H. Remington, verified May 16, 1903; Record, p. 90).

The only possible inference from this statement is that the Central Pacific Railroad Company ceased to maintain an office in the City of New York after the year 1900.

We therefore have a case in which Stubbs a director of the defendant (not an officer thereof), whose residence is at Chicago, came to the City of New York for a few days on business connected in no way with the business of the Central Pacific Railroad Company and was served with the summons in this action. In other words

Stubbs came to New York as an individual and not in his capacity as director of the Central Pacific Railroad Company. We have the further fact that the company has gone out of business and has been out of business since July, 1899, and we have the additional fact that it has no property or office in the State of New York. Does a service of the summons upon the director of the defendant under the circumstances stated properly bring the defendant before the court?

We respectfully submit that under the conditions just recited this Court has held more than once that such service of a summons must be set aside. The reason which underlies the decisions of this Court upon the question is the injustice of claiming that a company is within a state where it has no property and does no business, because an officer thereof comes into that state, not in his capacity as an officer of that company, but as an individual, and for the purposes of a private individual and for such purposes alone.

This Court has so held notwithstanding any decisions of state courts to the contrary and the last expression of the Court upon this question is found in the case of *Conley* vs. *Mathieson Alkali Works*, 190 U. S., 406. In the Conley case

the summons and complaint were served in the Supreme Court of the State of New York upon directors of the Mathieson Alkali Works, who were residents in such state. The case was removed to the federal court and a motion made to set aside the service of the summons. There was some conflict in the affidavits as to whether the defendant had ceased to do business in the State of New York and this question was referred by the court to a Referee. It was held by the Referee that the defendant had ceased to do business in the State of New York at the time the summons and complaint were served upon the directors of the defendant. The lower court thereupon set aside the service of the summons. The judgment below was affirmed by the Supreme Court of the United States and the decision of that court is embodied in the syllabus which is to the following effect:

> "Service in New York of a summons upon a director of a foreign corporation who resides in New York is not sufficient to bring the corporation into court where, at the time of service, the corporation was not doing business in the State of New York."

It is to be noted that the present case is stronger

than the Conley case for the reason that the director here served was not a resident of New York, but was incidentally there on business in no way connected with the business of the defendant.

A similar question arose in the case of *Goldey* vs. *Morning News Co.*, 156 U. S., 518. The defendant in the Goldey case was a Connecticut corporation. The summons and complaint were served in an action in the State Court of New York upon the president of the defendant who happened to be temporarily in New York. The Morning News Company did no business in New York and had no property in New York. The case was removed from the state court to the federal court and a motion made to set aside the service of the summons. The motion was granted and the order granting it was affirmed by this Court.

The ground of the decision of these cases is perhaps best expressed by a quotation from the decision of the Supreme Court in *St. Clair* vs. *Cox*, 106 U. S., 350–359, where it was said:

> "In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former

State, the Supreme Court of New Jersey said, that a law of another State which sanctioned such service upon an officer accidentally within its jurisdiction was '*so contrary to natural justice and to the principles of international law, that the courts of other States ought not to sanction it.*' "

See, also, to the same effect,

*Wabash Western Railway* vs. *Brow*, 164 U. S., 271.

*St. Clair* vs. *Cox*, 106 U. S., 350.

*Clews* vs. *Woodstock Iron Co.*, 44 Fed. Rep., 31 (Judge LACOMBE).

*Bentlif* vs. *Finance Corporation*, 44 Fed. Rep., 667 (Judge WALLACE).

*Reifsnider* vs. *Publishing Co.*, 45 Fed. Rep., 433.

The fundamental principle of the foregoing cases is well stated by Judge EVANS in the case of *Swann* vs. *Mutual Reserve Fund Life Association*, 100 Fed. Rep., 922–925, as follows:

"This rule is based, not only upon the essential principles of the law of corporations, but upon the fundamental doctrine that such service would not be due process of law. *An officer of a corporation however high in grade, when casually away from the home of the corporation, does not carry with him out of the home jurisdiction of his com-*

*pany, his official character, authority, or responsibilities, because it is not so intended by his principal. In short, under these circumstances, he does not represent his company, although he is its president, its highest officer, and its most powerful agent.*"

It is, therefore, clear that, under the foregoing authorities, the motion to set aside the service of summons in this case was properly granted, unless the defendant is to be denied this right because in the state court before the removal and before it had the right of removal, the defendant made a motion to set aside the service of the summons. Before considering this question it must be remembered that the question raised in the state court by the plaintiff was not raised at a time when the defendant had the alternative of making the motion either in the state or federal court *and also that the motion made by the defendant in the state court had not finally been determined there against it.* It is true that at a Special Term the motion had been denied, but an appeal was pending from the interlocutory order denying such motion at the time the case was removed to this court and this case comes to this court with the question of the service of

the summons still open and pending. The defendant is, therefore, in no different situation than it would have been if the motion had been made in the state court to set aside the service of the summons and the case immediately removed to the federal court. In other words, the question of whether the service was a good service or not was just as much open in this case as in such a case as that suggested.

It has been held by the federal courts many times that a case begun in the state court, in which a motion has been made to set aside the service of the summons, can be removed to the federal court and the motion then made in that court.

In *Morris* vs. *Graham*, 51 Fed. Rep., 53, it appeared that the defendant "entered a special appearance in the state court for the purpose of contesting the validity of the service, and before the question was decided removed the cause to this court [federal court], leaving that question still pending," and upon the question in controversy in the present case the court held, as appears by the Syllabus, as follows:

> "Where defendants enter a special appearance in the state court for the purpose of

> contesting the validity of service, and subsequently remove the cause to a federal court, such removal, even though it should be considered as equivalent to a general appearance, does not preclude the court from examining the legality of the original service; for, while a general appearance is a waiver of mere irregularities of service, the court may at any time dismiss the case for any illegality rendering the service void."

In *McGillin* vs. *Claflin*, 52 Fed. Rep., 657, the same question was again decided, and it was held that

> "A non-resident defendant, who files in the state court a special appearance, for the purpose of objecting to the jurisdiction, and subsequently removes the cause to a federal court, expressly disclaiming in his petition for removal any purpose to enter a general appearance, does not by such removal waive the jurisdictional question, but may renew the same and have it determined by the federal court" (Syllabus).

In *Donahue* vs. *Fire-Clay Co.*, 94 Fed. Rep., 23, a motion in the state court to set aside the service of the summons was pending at the time of removal.

In *Tortat* vs. *Mining Co.*, 111 Fed. Rep., 426, a motion in the state court to set aside the summons was also pending at the time of removal.

The same is true of the case of *Kauffman* vs. *Kennedy*, 25 Fed. Rep., 785.

In *Miner* vs. *Markham*, 28 Fed. Rep., 387, the defendant was a member of Congress from California on his way to attend a session of Congress in the following December. He was traveling with his family and stopped at a place in Wisconsin to visit his brother. His children were ill and he remained in Wisconsin for several days. During that time he was served with a summons in the state court. He moved in the state court to set aside the service of the summons. *The motion was denied.* He then removed the case to the federal court, renewed the motion and the motion was granted. The court held as follows:

> "Where a defendant appears specially in the state court, both in his motion to set aside a service of summons, and in his application for the removal of the case to the United States court, and the motion in the state court is denied without prejudice to a renewal of the same, the defendant has

not waived his privilege, and can assert it in the United States circuit court with the same force and effect as if the suit has been brought and the motion made there in the first instance." (Syllabus.)

It is true that in the Miner case just cited the state court denied the motion with leave to renew. We do not see that the leave to renew makes the case any different from the present case or from the cases of *Morris* vs. *Graham* and *McGillin* vs. *Claflin* just cited. The leave to renew simply meant that the matter was not finally determined in the state court. The question in the case at bar was still pending in the state court and not there finally determined by reason of the appeal to the Appellate Division. The whole point is this, was the question of the service of the summons still open and not finally determined in the state court. If so, it makes no difference whether it was open because a provision in the order that it was made without prejudice to the right to renew or because an appeal had been taken from such order to a higher court. In either event the question of jurisdiction by reason of the service of summons would be still open and pending in the state

court and under such circumstances it is squarely held by the foregoing authorities that the motion can be renewed in the federal court and will be granted if the facts so warrant.

The cases which we have cited go much further than is necessary in the present case. In all of the cases referred to the actions were removable controversies at the time the special appearances for the purpose of setting aside the summons were entered in the state courts. The defendants, while having the alternative of removal to the federal court, elected to make their motions in the state court, and yet it was held that upon removal the motion to set aside the summons could again be made in the federal court.

The case at bar, however, was not a removal controversy at the time the defendant specially appeared in the state court, and the defendant then had no power of election whether it should make its motion in the state court or in this Court. It did not then have the power to remove the case, for this Court has held in *Powers* vs. *Railway Co.*, 169 U. S., 92, 100, that "so long as there does not appear of *record* to be any removable controversy, no party can be entitled to remove it." The defendant, therefore, in this case

at the time it specially appeared in the state court had no option, but was obliged to submit the question to the state court or else lose the right by a general appearance to ever thereafter raise the question in any court. The defendant yielded to the inevitable and did what it could, knowing that the federal courts had always held such a service as appears in the present case not "due process of law," but being then unable to bring the case to that jurisdiction. The defendant was obliged to raise the question in the state court. The motion in the state court was not of the defendant's seeking, but was made there under compulsion and, because the action was not then of record a removable controversy under the decision in the Powers case (169 U. S., 92, 100).

The defendant is no more bound by a decision in the state court before the case became a removable controversy and when it had no volition in the matter than is a defendant, who is compelled to litigate a case in the state court after the case has been removed to the federal court, because of the fact that the state court declines to acquiesce therein and continues to adjudicate the case in the state court. In such

a situation this court has held in *Kern* vs. *Huidekoper*, 103 U. S., 485, that

> "Where a state court, proceeding to the trial of a suit which had been removed therefrom, renders judgment against the party, whose petition for a removal it erred in refusing to grant, he may raise here the question as to the jurisdiction of that court, notwithstanding the fact that he appeared at the trial and insisted upon the merits of his cause of action or defense" (Syllabus).

The court said at page 492 as follows:

> "The fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the state court to try the case."

We most respectfully submit that the denial of a motion in the state court obtained by a defendant in that court by compulsion because his case is not then of record a removable controversy does not prevent the defendant from raising the question again in the federal court, especially when an appeal is pending in the state court from the order denying the motion. There is no authority which so holds and we claim

that the due removal of this case to this court as soon as it became a removable controversy,

> "enables the defendant to avail himself, in the circuit court of the United States of any and every defense, duly and seasonably reserved and pleaded, to the action, 'in the same manner as if it had been originally commenced in said circuit court'" (*Goldey* vs. *Morning News*, 156 U. S., 518, 525).

The defendant in this action has certainly "duly and seasonably reserved" in the state court the point that the service of the summons was not a valid one and that the court had no jurisdiction over the defendant by reason thereof, and under the ruling of the supreme court is now entitled to raise it in this court.

Further than that, the motion in the court below was made upon evidence which was not before the state court. The papers printed in the Appendix to this brief were not introduced in the state court and would alone have been sufficient ground upon which to renew the motion in that court. Such right of renewal certainly cannot be lost by removal. A defendant is not worse off by reason of removal, than he would otherwise be.

**Reply to Brief of Plaintiff in Error (pages 91 et seq.) on Motion to Set Aside the Service of the Summons.**

I.

In Point IX. of his brief the plaintiff in error insists that a federal court does not sit as a Court of Error to review the decisions of the state court. He then cites several authorities in the federal courts in which it is held that a defendant who has been served with a summons and *complaint*, and who, therefore had the alternative of raising the question of the service of the summons either in state or federal court lost that right upon removal to the federal court, if he had first made the attempt in the state court and the motion had been finally determined against him.

It is hardly necessary to point out the clear line between the cases cited by the other side and the case at bar. In every case referred to by counsel for the plaintiff in error the question raised by the defendant in the state court as to the service of the summons was not an open question at the time the action was removed to the federal court. It had been determined against the defendant and the determination acquiesced in and the defendant then removed

the case and renewed the motion. Such is not the situation of the case at bar, for here the question was not finally determined and was on appeal in the state court at the time of removal. A further most important and vital difference between the cases cited by the plaintiff in error and the case at bar is that in every case referred to by him a *complaint* had been served upon the defendant, and at the time he made his motion in the state court he knew that the case was one removable to the federal court and notwithstanding elected to try the question in the state court. It is unnecessary to repeat here what has been said so often, viz.: That at the time the motion was made in the case at bar in the state court and at the time of the appeal from the order denying that motion the defendant and its attorneys did not know and had no means of knowing that the case was one which the defendant was entitled to remove and try in the federal court under the provisions of the statutes of the United States. It was not then a removable case under the decision of *Powers* vs. *Railroad Company*, 169 U. S., 92, 100, as it did not appear of *record* to be a removable controversy until October 23, 1903.

The fact that this action was not a removable

controversy at the time the motion was made in the state court to set aside the summons presents an unanswerable difference between the case at bar and the cases cited by plaintiff in error on page 92 and the following pages of his brief. In all of the cases referred to by the other side the action was a removable controversy at the time the motion was made and decided. The defendants had the option of raising the question in the state court or federal court and elected the former. No such situation is presented here. The defendant in the case at bar had no choice, but was compelled to make his motion in the state court or else lose his right to even make it in any court by appearing generally. The action at the time of the motion was not a removable controversy. The defendant had not then the right to bring it to this court, for "so long as there does not appear of record to be any removable controversy, *no party* can be entitled to remove it" (*Powers* vs. *Railway Co.*, 169 U. S., 92, 100).

Whatever, therefore, was done by the defendant in the state court was done, not from choice, but from compulsion, not from volition, but from necessity. There was no election of forums.

On the contrary, the defendant was forced to make the motion in the state court and to take the appeal. The moment an opportunity for a choice was open it was at once acted on without awaiting a decision on the appeal to the Appellate Division, and the case brought to this court. It is, therefore, most earnestly insisted that the authorities referred to by plaintiff have no bearing whatever in the present discussion.

The cases relied upon by the plaintiff are: *Loomis* vs. *Carrington*, 18 Fed. Rep., 97; *Bragden* vs. *Perkins-Campbell Co.*, 82 Fed. Rep., 338; *Allmark* vs. *Platte Steamship Co.*, 76 Fed. Rep., 615; *Denison* vs. *Shawmut Mining Co.*, 124 Fed. Rep., 860; *Brooks* vs. *Farwell*, 4 Fed. Rep., 166; *Duncan* vs. *Gegan*, 101 U. S., 810.

We will examine these cases in detail; In *Loomis* vs. *Carrington*, *supra*, it appears that the motion to dismiss the writ was argued and denied. No appeal was taken from the order denying the motion and at the time of removal the question was no longer an open one, but had been acquiesced in by defendant. Further than that, the action was a removable controversy at the time the motion to dismiss was made in the state court.

In *Bragden* vs. *Perkins-Campbell Co.*, *supra*, the motion to set aside the service of the summons was denied by the state court and no appeal taken from the order denying the motion. At the time, therefore, of removal the question had been determined against the defendant and was no longer open. It also appears that, at the time the motion was made in the state court, the case was removable to the federal court, as the last three lines of the decision show that the complaint was served with the summons, inasmuch as the defendant upon the denial of its motion to set aside the service of the summons was given thirty days within which to plead.

In *Allmark* vs. *Platte Steamship Co.*, *supra*, the defendant moved to set aside the service of the summons in the state court and the motion was denied. No appeal was taken from the order denying the motion and the question was of course no longer open at the time the action was removed to the federal court, but had been acquiesced in by the defendant. It also appears from a decision in the same case reported just before the one cited by plaintiff in error that a complaint was served with the summons and that at the time the defendant made its

motion in the state court the case was one which could be removed into the federal court.

In *Denison* vs. *Shawmut Mining Co.*, *supra*, it appeared that a motion had been made in the state court and denied, and that in the federal court after removal a motion was made for the rehearing of such motion. From the decision of the court it is to be gathered that there was no appeal in the state court from the order denying the motion to set aside the attachment. The question was therefore ended in the state court and acquiesced in there by the defendant. It also appears that at the time of the motion to set aside the service the case was one removable to the federal court, and that on the motion for rehearing in the federal court no new evidence was introduced as in the case at bar.

*Brooks* vs. *Farwell*, *supra*. This case seems to have nothing to do with the question. It was a motion by the plaintiff after removal to the federal court asking for judgment, claiming that the answer of the defendant could not be received. The motion was denied. The quotation in the plaintiff's brief does not of course pretend to determine the point raised by us in the present case.

The authority of *Duncan* vs. *Gegan*, 101 U. S., 810, referred to by the plaintiff, does not seem to be of any importance, as the question here presented does not there appear. The Duncan case arose under the old Act of Congress of 1875, and simply held that a question which had been finally settled upon *an appeal* in the state court could not be re-opened in the federal court. The difference between this case and the Duncan case is, of course, obvious. The question in the case at bar had not been settled "on appeal," but was still open and pending "on appeal" in the state court at the time of the removal to the federal court.

The plaintiff is mistaken in thinking that we are asking this court to review the decision of the state court. We are simply presenting to this court, as if the case had originally commenced in this court, a question which was open and pending in the state court at the time of the removal of the case. This, under the decisions referred to in our brief, we have the right to do.

It was certainly so held in *Goldey* vs. *Morning News*, 156 U. S., 518–525, when this court said, at page 525, as follows:

"Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; *but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defence, duly and seasonably reserved and pleaded to the action, 'in the same manner as if it had been originally commenced in said circuit court.'* "

II.

In answer to the suggestion of counsel for the plaintiff in error that a federal court does not sit as a court of error, we call the attention of the court to the discussion of this question in the case of *Bryant* vs. *Thompson*, 27 Fed. Rep., 881, in which it was claimed that the federal court did not sit as an appellate tribunal or court of error, and, therefore, could not reverse an interlocutory order of the state court. This contention was, however, overruled, although in the particular case before the court it decided not to reverse the order of the state court for the reason that the federal court thought such order was

right. In the course of the opinion, it was said as follows:

> "It is argued by counsel that this court does not sit as an appellate tribunal in cases transferred from the state court, but takes them, and proceeds with them to final determination, just as they come from the state court; and, therefore, it is insisted that it is not competent here to review or reverse any proceeding that may have been had in the state court before the removal of the cause into this court. I am aware that this language is to be found in the decisions of some federal courts, but without proper qualtification it is misleading. It is true that in removal cases the United States circuit court does not sit as a court of errors, and as such it cannot review and reverse the interlocutory orders and decisions of the state courts. *But it is nevertheless competent for the circuit court to set aside or modify any interlocutory orders or decisions made in the state court before removal, when it satisfactorily appears that such orders are erroneous.* The circuit court after the removal certainly has the same power over the decisions made in the state court that it has over its own past rulings and orders in the cases commenced originally before it.

If a case transferred had remained in the state court, it would have been entirely competent for that tribunal to have changed, modified or set aside its own orders, when satisfied that they were erroneous. Thus, if the state court had granted a temporary injunction, it would have been competent for the same court, upon a proper showing to set it aside. If it had, upon a proper hearing, denied a motion to dissolve an injunction, it would have been entirely competent for it to entertain another motion to dissolve, and to grant such second application upon a satisfactory showing. So, if a state court denies an application to remove or discharge a receiver, it may, so long as the cause is still before it, with competent jurisdiction, entertain and grant a subsequent motion for the same purpose. The same may be said of all its interlocutory orders.

"Now, when a cause is removed from the state court to the United States circuit court it stands in the latter just as it stood in the state court before removal. All orders and rulings in the state court remain in full force until they are changed or set aside in the circuit court. But the circuit court, certainly, has the same power over them—

the same jurisdiction to modify them or set them aside—that the state court would have had if the cause had not been removed. *Interlocutory orders made in the State Court clearly do not, by virtue of their removal to the United States Circuit Court, receive any such additional force and effect as to preclude the circuit court from doing with them what the state conrt might have done if the cause had remained there.* The circuit court certainly has the same power over interlocutory orders and decrees made in the state court before removal that it might exercise over its own past decretal orders and decisions in a cause originating before it."

The value of the reasoning in the opinion just quoted is in no way detracted from because in the particular case then before the court it thought it proper not to reverse the order of the state court. The soundness of the reasoning is apparent when it is considered that if the case at bar had remained in the state court the order denying the motion would probably have been reversed on the appeal to the Appellate Division. It cannot be that the right to set aside such order or to renew the motion is lost because of removal, when it was not lost in the state court.

In the consideration of this matter it is important to recollect that the order in the state court was an interlocutory order only, and in no way final, from which an appeal was pending in the state court at the time of removal. The right and advantages of such appeal are certainly not lost by removal, when the question goes to the jurisdiction of the court over the person of the defendant. A removal to the federal court has never been construed as taking away from a litigant rights which he had in the state court.

III.

The motion to set aside the service of the summons in the court below was made upon evidence which was not before the state court. The two papers which are attached to this brief as an appendix were made part of one of the affidavits on which the motion was made to set aside the service of the summons in the federal court (Record, pp. 103–104). These papers show conclusively that there was no ground for any claim that the Central Pacific Railroad Company had any property in the State of New York. There was no opinion written in the state court denying the motion to set aside the service of

the summons, and for all that appears, the court may have had some doubt upon this point. This question was entirely removed in the federal court by the new evidence in the case which would have been perfectly competent and sufficient evidence upon which to make a motion in the state court for a reargument or for leave to renew the motion to set aside the service of the summons.

The authorities referred to on page 93 and the following pages in the brief of plaintiff in error all state that a motion can be made in the federal court, if made for reasons which did not appear upon the previous argument in the state court.

The point in this case is that the question at the time of the removal into the federal court was not settled and determined in the state court. We would have had a right to continue the presentation of the question in the state court, if the case had not been removed. Certainly by such removal, the defendant cannot have lost its right, especially in view of the fact that the motion was renewed in this court upon additional evidence which was not before the state court.

## FOURTH POINT.

The answer to all these questions seems to be that this court is not the place for their discussion. The case should have been taken to the Circuit Court of Appeals for the purpose of there raising all of these questions. This court is without jurisdiction of the case for the reasons given in our first point, as it is not possible to maintain that any of the questions arising in the second and third points in this brief in any way tend to show that the court below did not have jurisdiction of the case as a federal tribunal, but on the contrary that the case was dismissed for want of jurisdiction of the person of the defendant; that is to say, for want of jurisdiction as a judicial tribunal. In addition, the ground of the motion to remand was not that the court did not have jurisdiction of the case as a federal court, as that was conceded by the plaintiff in error, inasmuch as there was the requisite difference of citizenship and a sufficient amount involved. In other words, the motion to remand was made upon technical grounds on the theory that in some manner the defendant had lost the right to file the petition for removal, or that the

petition for removal was not filed and presented in a proper manner to the state court.

These questions are properly for the circuit court of appeals to determine, and not for this Court, which under its later decisions, has no jurisdiction of a case brought direct from the circuit court under the provisions of the Judiciary Act of 1891, except when such case was dismissed upon the ground that the court below had no jurisdiction as a court of the United States, or the motion to remand was rested upon the contention that there was a lack of jurisdiction in the federal court as contradistinguished from the state court (*Courtney* vs. *Pradt*, decided January 3, 1905).

## FIFTH POINT.

**The judgment of the court below should be affirmed.**

MAXWELL EVARTS,
Of Counsel for Defendant in Error.

# APPENDIX.

## Indenture transferring all the property of the Central Pacific Railroad Company, the defendant in error, to the Central Pacific Railway Company, Referred to on page 103 of the Record.

EXHIBIT "A."

AN INDENTURE AND AGREEMENT, made and entered into the twenty-ninth day of July, one thousand eight hundred and ninety-nine, by and between the CENTRAL PACIFIC RAILROAD COMPANY, a corporation created, organized and existing under the laws of the State of California, and invested with certain rights and franchises by and under the laws of the United States of America, and by and under the laws of the States of Utah and Nevada, party of the first part, and the CENTRAL PACIFIC RAILWAY COMPANY, a corporation created, organized and existing under and by virtue of the laws of the State of Utah, of the second part:

WHEREAS, the party of the first part is the owner of the lines of railroad, the railways and other properties, rights, privileges and franchises, and the lands and notes and securities and moneys, hereinafter in the granting clause hereof described or referred to; and,

WHEREAS, certain portions of the said lines of railroad and railways and their appurtenances, and said lands, owned by the said party of the first part, are subject to the liens of certain mortgages severally and respectively securing bonds now outstanding (hereinafter called "outstanding old bonds") for the several aggregate principal sums following, to wit:

*(a)* The Central Pacific Railroad Company of California First Mortgage Bonds, secured by mortgage dated July 25, 1865, of the several series and for the

amounts and now matured or maturing at the dates hereinafter stated, respectively, viz.:

| Series. | Amount. | Date of Maturity. |
|---|---|---|
| Series A | $2,995,000 | Matured. |
| B | $ 1,000 | Matured. |
| | $ 999,000 | December 1, 1899. |
| C | $ 4,000 | Matured. |
| | $ 996,000 | December 1, 1899. |
| D | $ 4,000 | Matured. |
| | $1,379,000 | December 1, 1899. |
| Total | $6,378,000 | |

*(b)* The Central Pacific Railroad Company of California First Mortgage Bonds, secured by mortgage dated January 1, 1867, of the several series and for the amounts and now matured or maturing at the dates hereinafter mentioned, respectively, viz.:

| Series. | Amount. | Date of Maturity. |
|---|---|---|
| Series E | $ 5,000 | Matured. |
| | 3,990,000 | June 1, 1900. |
| F | $ 9,000 | Matured. |
| | $3,990,000 | June 1, 1901. |
| G | $ 13,000 | Matured. |
| | $3,985,000 | June 1, 1901. |
| H | $ 6,000 | Matured. |
| | $3,993,000 | June 1, 1901. |
| I | $ 13,000 | Matured. |
| | $3,498,000 | June 1, 1901. |
| Total | $19,502,000 | |

*(c)* The Western Pacific Railroad Company First Mortgage Bonds, secured by mortgage dated July 1, 1869, of the several series and for the amounts and which matured at the date hereinafter mentioned, viz.:

| | | |
|---|---|---|
| Series A for | $1,970,000 | Matured July 1, 1899. |
| B " | 765,000 | " " " " |
| Total | $2,735,000 | |

*(d)* The California and Oregon Railroad Company, and Central Pacific Railroad Company, successor, First Mortgage Bonds, secured by mortgages dated January 1, 1868 and January 1, 1872, respectively, of the several series and for the amounts and maturing at the date hereinafter mentioned, viz.:

| | | |
|---|---|---|
| Series A for | $5,982,000 | Maturing January 1, 1918 |
| B " | $4,358,000 | " " " " |
| Total | $10,340,000 | |

*(e)* The Central Pacific Railroad Company First Mortgage Bonds (San Joaquin Valley Division), secured by mortgage dated October 1, 1870, for the amount of $6,080,000, maturing October 1, 1900.

*(f)* The Central Pacific Railroad Company Fifty-Year Five Per Cent. Bonds, secured by mortgage dated April 1, 1889, to the amount of $12,283,000, maturing April 1, 1939, of which bonds the amount of $2,038,000 are held as security for the Land Bonds next hereinafter mentioned.

*(g)* The Central Pacific Railroad Company Land Bonds, secured by mortgage dated October 1, 1870, to the amount of $2,134,000 and maturing October 1, 1900.

AND, WHEREAS, heretofore and under date of February 1, 1899, the said party of the first part (in pursuance of a Settlement Agreement between the United States of America, the said party of the first part, and Messrs. Speyer & Co., dated February 1, 1899, entered into under the provisions of an Act of Congress, approved July 7, 1898) executed its twenty promissory notes in favor of the United States of America for $2,940,635.78 each, maturing on or before the expiration of each successive six months from the date thereof; and,

WHEREAS, the said party of the first part is also indebted to the holders of its bonds to the amount at their face value of $56,000, bearing date October 1, 1886, and payable October 1, 1936, with six per cent.

interest, payable semi-annually, commonly known and referred to as "Fifty-year Bonds of 1936."

AND, WHEREAS, under and by virtue of authority from the States of California, Utah and Nevada, the party of the first part has sold to the party of the second part hereunder, subject to the liens now existing thereon, and upon and subject to the terms and conditions hereinafter prescribed, all the lines of railroad, railways and other properties and rights, privileges and franchises, and lands, notes, securities and moneys hereinafter in the granting clause hereof described and referred to, and any and all other properties, claims, demands, choses in action, rights, privileges and franchises of the said party of the first part:

NOW, THEREFORE, THIS INDENTURE WITNESSETH, That, in consideration of one dollar, which, simultaneously with the execution hereof, has been paid by the party of the second part to the party of the first part, the receipt whereof by said party of the first part is hereby acknowledged, and for and in consideration of the undertakings, covenants and agreements on behalf of the said party of the second part hereinafter contained, said party of the first part has granted, bargained, sold, conveyed, assigned, transferred and set over, and hereby grants, bargains, sells, conveys, assigns, transfers and sets over, unto the party of the second part:

FIRST. The lines of railroad owned by the party of the first part, extending from a point about five miles west of Ogden, in the State of Utah, through the States of Utah, Nevada and California, to and into the City of Sacramento, in the State of California, and from said Sacramento to San José, in said last mentioned State, and from Niles to Oakland, and from Lathrop to Goshen, all in the State of California, and from Roseville, in said State of California, to the California and Oregon boundary; also the leasehold of the railroad from a point about five miles west of Ogden to Ogden, in the County of Weber in the State of Utah.

SECOND. All the railways belonging to the party of

the first part in San Francisco, Oakland and Alameda in the State of California, and the terminals belonging to the party of the first part, used in connection therewith, including wharves, piers, docks, embankments, ferries, steamers and transfer and ferryboats.

THIRD. All roadbeds, superstructures, rights of way, rails, tracks, side tracks, bridges, viaducts, terminals, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, coal houses, wood houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections and fixtures, and all other things of whatever kind, now owned by the party of the first part, which shall in anywise, or at any time, belong or appertain to, or be provided for use upon, or for the purposes of, any of said lines of railroad, and any and all other property, real or personal, of every kind and description, now owned by the party of the first part, for use upon or for the purposes of such lines of railroad or terminals, or any of them.

FOURTH. Any and all locomotives, engines, cars and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture and other chattels of the party of the first part now owned for use upon any of such lines of railroad or terminals or other property.

FIFTH. Any and all other railroads, equipment and terminals owned by the party of the first part.

SIXTH. Any and all corporate or other rights, privileges and franchises which the party of the first part now has, or hereafter shall acquire, possess or become entitled to, for, or appertaining to, the construction, maintenance, use or operation of, such lines of railroad or terminals or other property.

SEVENTH. Any and all the rents, issues, profits, tolls and other income of such lines of railroad or terminals or other property.

EIGHTH. All and singular the several sections of land granted by the United States to the Central Pacific Railroad Company of California by an Act of Congress approved on the first day of July, 1862, entitled "An

Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," and an act amendatory thereof, approved on the second day of July, 1864; also all the lands granted to the California and Oregon Railroad Company by an Act of Congress approved on the twenty-fifth day of July, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon;" and also all the estate, right, title, interest claim and demand whatsoever, at law or in equity, of, in or to the same or any part or parcel thereof, which the said party of the first part now has, holds, owns or is entitled to, or hereafter may or shall acquire, have, hold, own or be or become entitled to by force or virtue of the said Acts of Congress, saving and excepting all parts and parcels of said lands which were sold prior to the execution of the mortgage from the Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, dated the first day of October, A. D. 1870, securing the Land Bonds of said last-mentioned Company, and all such parts and parcels of said lands as shall have since been released from the said mortgage securing such Land Bonds in accordance with the provisions thereof.

NINTH. All notes now outstanding given in payment for lands covered by such mortgage of the Central Pacific Railroad Company, dated October 1, 1870, securing said Land Bonds.

TENTH. All securities and moneys which are held in any sinking fund created or existing by or under any mortgage existing on the 20th day of February, 1899, whether of the party of the first part or any divisional company by the consolidation whereof it was formed.

ELEVENTH. All other properties, claims, demands, moneys, choses in action, leaseholds, rights, privileges and franchises owned by or belonging to the party of the first part, or to which it is in any wise entitled.

TO HAVE AND TO HOLD, the premises, railroads, rail-

ways, properties real or personal, claims, demands, choses in action, leaseholds, rights, privileges, franchises, estates and appurtenances, lands, land notes and securities and moneys hereby granted, bargained, sold, conveyed, assigned, transferred or set over, or intended so to be, unto the party of the second part and to its successors and assigns forever, but subject to the liens thereon hereinbefore mentioned and referred to.

AND IN FURTHER CONSIDERATION HEREOF, and in order to provide for the readjustment of the present funded indebtedness of the party of the first part (subject to which the properties of said party of the first part are hereby conveyed), and for the purpose of securing the payment of the amounts becoming due on the Notes given by said party of the first part to the United States under said Settlement Agreement, dated February 1, 1899, as in said Settlement Agreement prescribed, the party of the second part has assumed and hereby assumes the payment of all the indebtedness and guaranties of the said parties of the first part, and has undertaken, covenanted and agreed, and hereby undertakes, covenants and agrees, to and with the party of the first part, that it will issue stocks and securities and execute mortgages as prescribed in the Central Pacific Readjustment Plan and Agreement dated February 8, 1899, issued by Speyer & Co., Speyer Brothers, Laz Speyer Ellissen, Teixeira de Mattos Brothers and the Deutsche Bank of Berlin, as Readjustment Managers, or as the same may be modified under the terms thereof and with the assent of the party of the second part, and in a certain Agreement bearing date the 20th day of February, one thousand eight hundred and ninety-nine, by and between F. G. Banbury, Esq., M. P., John B. Akroyd, Esq., Lord Alwyne Compton, M. P., Daniel Marks, Esq., and Joseph Price, Esq., as the London Committee of Central Pacific Shareholders, Messrs. Speyer & Company of New York, Messrs. Speyer Brothers of London, Mr. Laz Speyer Ellissen of Frankfort-on-the-Main, Messrs. Teixeira de Mattos Brothers of Amster-

dam, and the Deutsche Bank of Berlin, as Readjustment Managers as therein stated, and the Southern Pacific Company, and in a certain other Agreement bearing date the 1st day of March, one thousand eight hundred and ninety-nine, by and between August Belmont, Esq., Hon. John G. Carlisle and George Coppell, Esq., as the American Committee of Central Pacific Shareholders, the said Readjustment Managers and the Southern Pacific Company, and, under arrangements made or to be made with said Readjustment Managers will carry out such Readjustment Plan and said Agreements.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed on their behalf respectively by their respective Presidents, and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries, the day and year first above written.

CENTRAL PACIFIC RAILROAD COMPANY,

By

{Seal of Central Pacific Railroad Company.} ISAAC L. REQUA, President.

Attest:

W. M. THOMPSON, Secretary.

CENTRAL PACIFIC RAILWAY COMPANY,

By

{Seal of Central Pacific Railway Company.} THOMAS MARSHALL, President.

Attest:

DAVID B. HEMPSTEAD, Secretary.

STATE OF CALIFORNIA, City and County of San Francisco, } ss.:

On this 29th day of July, A. D. 1899, before me, E. B. RYAN, a Notary Public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Isaac L. Requa, known to me to be the President, and W. M. Thompson, known

to me to be the Secretary, of the Central Pacific Railroad Company, the corporation described in and who executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office, in the City and County of San Francisco, the day and year in this certificate first above written.

E. B. RYAN,
(Notarial Seal.) Notary Public,
In and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss.:
City and County of San Francisco, }

On the 29th day of July, A. D. 1899, personally appeared before me Isaac L. Requa, who, being by me duly sworn, did say that he is the President of the Central Pacific Railroad Company, the corporation named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by resolution of its Board of Directors, and said Isaac L. Requa acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, in said City and County of San Francisco, on this 29th day of July, A. D. 1899.

E. B. RYAN,
A Commissioner of Deeds for the State of
[SEAL.] Utah, residing in the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss.:
City and County of San Francisco, }

On this 29th day of July, A. D. one thousand eight hundred and ninety-nine (1899), before me E.

B. RYAN, a Commissioner of Deeds for the State of Nevada, duly appointed, commissioned and sworn, residing in the City and County of San Francisco and State of California, personally appeared the within-named Isaac L. Requa, President of the Central Pacific Railroad Company, and W. M. Thompson, Secretary of the Central Pacific Railroad Company, personally known to me to be the said officers of the said corporation, respectively, and the individuals described in and who executed the within instrument as such officers of said Company, and they each severally and personally then and there acknowledged to me that they executed the said within instrument as the free act and deed of the said Central Pacific Railroad Company, freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as such Commissioner, at my office in said City and County of San Francisco, the day and year last above written.

E. B. RYAN,
A Commissioner of Deeds for the State of Nevada, residing in San Francisco, California.

[SEAL.]

STATE OF UTAH,
County of Salt Lake, } ss.:

On this 31st day of July, A. D. 1899, before me, LULA GEOGHEGAN, a Notary Public in and for the County of Salt Lake, State of Utah, duly commissioned and qualified, personally appeared Thomas Marshall, known to me to be the President, and David B. Hempstead, known to me to be the Secretary, of the Central Pacific Railway Company, the corporation described in and which executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City

and County of Salt Lake, State of Utah, the day and year first above written.

LULA GEOGHEGAN,
Notary Public.

[Notarial Seal.]

My Commission expires September 17, 1901.

STATE OF UTAH, } ss. :
County of Salt Lake, }

On this 31st day of July, A. D. 1899, personally appeared before me Thomas Marshall, and David B. Hempstead, who, being by me respectively duly sworn, each for himself says that the said Thomas Marshall is the President of the Central Pacific Railway Company, and the said David B. Hempstead is the Secretary of said Company, one of the corporations named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by said President and Secretary, respectively, under and in pursuance of a resolution of its Board of Directors; and the said Marshall and Hempstead respectively acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, in said County of Salt Lake, State of Utah, on this 31st day of July, A. D. 1899.

LULA GEOGHEGAN,
Notary Public.

[NOTARIAL SEAL.]

My Commission expires September 17, 1901.

STATE OF UTAH, } ss. :
County of Salt Lake, }

On the 31st day of July, A. D. 1899, before me, LULA GEOGHEGAN, a Notary Public in and for the County of Salt Lake, State of Utah, duly appointed and qualified, personally appeared the within-named Thomas Marshall, President of the Central Pacific Railway Company, and David B. Hempstead, Secretary of the said Central Pacific Railway Company,

personally known to me to be the said officers of the said corporation, respectively, and the individuals described in and who executed the within instrument as such officers of said Company, and they each severally and personally then and there acknowledged to me that he executed the said instrument as the free act and deed of the said Central Pacific Railway Company freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as such Notary Public, at my office in said County of Salt Lake and State of Utah, the day and year last above written.

LULA GEOGHEGAN,
Notary Public.

[NOTARIAL SEAL.]

My Commission expires September 17, 1901.

## Agreement between the United States and Central Pacific Railroad Company, Referred to on Pages 103 and 104 of the Record.

EXHIBIT "B."

AGREEMENT made and entered into the first day of February, 1899, by and between the United States of America, acting by Honorable Lyman J. Gage, Secretary of the Treasury; Honorable Cornelius N. Bliss, Secretary of the Interior, and Honorable John W. Griggs, Attorney General, appointed by Act of Congress approved July 7, 1898, a Commission with full power to settle the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads, of the first part; the Central Pacific Railroad Company, a corporation created, organized and existing under the laws of the State of California and of the United States of America, of the second part, and Messrs. Speyer & Company, bankers, of the City of New York, of the third part.

WHEREAS, the Central Pacific Railroad Company, as now existing, was formed by the successive consolidations hereinafter mentioned, that is to say:

*(a)* Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company into a corporation named the Central Pacific Railroad Company, under Articles of Association and Consolidation dated June 22, 1870.

*(b)* Consolidation of the last-mentioned Central Pacific Railroad Company, the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company and the San Joaquin Valley Railroad Company into a corporation named the Central Pacific Railroad Company, under Articles of Association and Consolidation dated August 20, 1870.

AND, WHEREAS, the said Central Pacific Railroad Company, party of the second part hereto, is the owner

of the following lines of railroad with their appurtenances, which are known as and called the "Bond-Aided Lines," viz.:

A. The line of railroad (about $737\frac{50}{100}$ miles in length), from a point about five miles west of Ogden to Sacramento, to aid in the construction of which bonds were from time to time issued by the United States to the Central Pacific Railroad Company of California to the amount in the aggregate of twenty-five million eight hundred and eighty-five thousand one hundred and twenty dollars ($25,885,120) under and in pursuance of the provisions of the Act of Congress of the United States, entitled "An Act to aid in the construc-"tion of a railroad and telegraph line from the Mis-"souri River to the Pacific Ocean, and to secure to the "Government the use of the same for postal, military, "and other purposes," approved July 1, 1862, the Act to amend the last-mentioned Act, approved July 2, 1864, and the Act to amend the above-mentioned Acts, approved March 3, 1865.

B. The line of railroad (about $123\frac{14}{100}$ miles in length) from Sacramento to San José, to aid in the construction of which bonds were from time to time issued by the United States to the Western Pacific Railroad Company to the amount in the aggregate of one million nine hundred and seventy thousand five hundred and sixty dollars ($1,970,560) under and in pursuance of the provisions of the same acts of Congress under which bonds were issued to the Central Pacific Railroad Company of California, as above stated.

AND, WHEREAS, the said Central Pacific Railroad Company is also the owner of the following lines of railroad in the State of California with their appurtenances, which are known as and called the "Non-Bond-Aided Lines," viz.:

C. The line of railroad (about $24\frac{31}{100}$ miles in length) from Oakland to Niles.

D. The line of railroad (about $146\frac{8}{100}$ miles in length) from Lathrop to Goshen.

E. The line of railroad (about $296\frac{50}{100}$ miles in length) from Roseville to the Oregon boundary;

AND, WHEREAS, the said "Bond-Aided Lines" of railroad are covered by the following mortgages and liens, viz.:

FIRST. The bond-aided line from Sacramento to the eastern boundary of California by the First Mortgage of the Central Pacific Railroad Company of California to D. O. Mills and William E. Barron, Trustees, dated July 25, 1865, under which bonds are now outstanding to the amount of their face value of six million three hundred and seventy-eight thousand dollars ($6,378,000), of which bonds to the amount of three million and seven thousand dollars ($3,007,000) are now overdue, and bonds to the amount of three million three hundred and seventy-one thousand dollars ($3,371,000) will mature December 1, 1899.

SECOND. The bond-aided line from the eastern boundary of California to a point about five miles west of Ogden by the First Mortgage of the Central Pacific Railroad Company of California to D. O. Mills and William E. Barron, Trustees, dated January 1, 1867, under which bonds are now outstanding to the amount at their face value of nineteen million five hundred and three thousand dollars ($19,503,000), of which bonds to the amount of eighty thousand dollars ($80,000) are now overdue, and bonds to the amount of three million nine hundred and eighty-eight thousand dollars ($3,988,000) will mature June 1, 1900, and bonds to the amount of fifteen million four hundred and thirty-five thousand dollars ($15,435,000) will mature June 1, 1901.

THIRD. The bond-aided line from Sacramento to San José by the First Mortgage of the Western Pacific Railroad Company to D. O. Mills and William E. Barron, Trustees, dated October 28, 1869, under which bonds are now outstanding to the amount at their face value of one million nine hundred and seventy thousand dollars ($1,970,000), and will mature July 1, 1899.

FOURTH. The bond-aided line from a point about five miles west of Ogden to Sacramento by the statutory lien in favor of the United States under the acts of Congress, approved July 1, 1862, July 2, 1864, and March 3, 1865, above-mentioned, securing the balance of the indebtedness to the United States (amounting

as of the date of this agreement, to the sum of $53,389,-052.74), resulting from the issue of bonds to the Central Pacific Railroad Company of California as aforesaid to aid in the construction of said bond-aided line, such statutory lien being by said acts subordinate to the liens of the First Mortgages of the Central Pacific Railroad Company of California, described in the preceding subdivisions First and Second of this recital.

FIFTH. The bond-aided line from Sacramento to San José by the statutory lien in favor of the United States under the Acts of Congress approved July 1, 1862, July 2, 1864, and March 3, 1865, above mentioned, securing the balance of the indebtedness to the United States (amounting as of the date of this agreement, to the sum of $5,423,662.74), resulting from the issue of bonds to the Western Pacific Railroad Company as aforesaid to aid in the construction of said bond-aided line, such statutory lien being by said act subordinate to the lien of the First Mortgage of the Western Pacific Railroad Company described in the preceding subdivision Third of this recital.

AND, WHEREAS, the said Non-Bond-Aided lines of railroad are covered by the following mortgages and liens, viz.:

FIRST. The non-bond-aided line from Oakland to Niles by First Mortgage from the Western Pacific Railroad Company to D. O. Mills and William E. Barron, Trustees, dated October 28, 1869, under which bonds are now outstanding to the amount at their face value of seven hundred and sixty-five thousand dollars ($765,-000), and will mature July 1, 1899.

SECOND. The non-bond-aided line from Lathrop to Goshen by First Mortgage from the Central Pacific Railroad Company to D. O. Mills and W. C. Ralston, Trustees, dated October 1, 1870, under which bonds are now outstanding to the amount at their face value of six million and eighty thousand dollars ($6,080,000), and will mature October 1, 1900.

THIRD. The non-bond-aided line from Roseville to the Oregon boundary by First Mortgage from the California and Oregon Railroad Company to David S.

Dodge and Eugene Kelly, Trustees, dated January 1, 1868, and the supplemental mortgage from the Central Pacific Railroad Company as successor of the California and Oregon Railroad Company (by consolidation as aforesaid) to Eugene Kelly and Philo C. Calhoun, Trustees, dated January 1, 1872, under which last mentioned mortgages bonds are now outstanding to the amount at their face value of ten million three hundred and forty thousand dollars ($10,340,000), the date of maturity of such last mentioned bonds having been extended to January 1, 1918, by virtue of extension agreements dated September 27, 1887, and September 25, 1891, respectively.

AND, WHEREAS, all of the said bond-aided and non-bond-aided lines above referred to are further covered by Mortgage from the Central Pacific Railroad Company to the Metropolitan Trust Company of the City of New York, Trustee, dated April 1, 1889, under which there are now outstanding Fifty-year Five Per Cent. bonds of said Central Pacific Railroad Company maturing April 1, 1939, to the amount at their face value of twelve million two hundred and eighty-three thousand dollars ($12,283,000), of which bonds to the amount at their face value of $2,038,000 are now held by the Metropolitan Trust Company of the City of New York as security for the outstanding Land Bonds hereinafter mentioned.

AND, WHEREAS, it is claimed by the United States, but not conceded by the other parties hereto, that under and by virtue of the provisions of an Act entitled: "An act to alter and amend the act entitled: 'An act "'to aid in the construction of a railroad and telegraph "'line from the Missouri River to the Pacific Ocean, "'and to secure to the Government the use of the "'same for postal, military, and other purposes,' ap-"proved July first, eighteen hundred and sixty-two, "and also to alter and amend the act of Congress "approved July second, eighteen hundred and sixty-"four, in amendment of said first-named act," approved May 7, 1878, the balances of indebtedness to the United States hereinbefore referred to amounting in

the aggregate as of the date of this agreement to the sum of $58,812,715.48 are also secured by lien declared in said last-mentioned act upon all the railroad lines above mentioned whether aided or non-aided;

AND, WHEREAS, the lands granted to the Central Pacific Railroad Company of California, by the Act of Congress of July 1, 1862, above mentioned, and the lands granted to the California and Oregon Railroad Company by act of Congress approved July 25, 1866, with the exceptions and reservations mentioned in the mortgage hereinafter mentioned, were mortgaged by the Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, by mortgage dated October 1, 1870, to secure an issue of Land Bonds of the Central Pacific Railroad Company which matured October 1, 1890, a part of which were by Extension Agreement dated September 4, 1890, extended to October 1, 1900, and of which there are now outstanding bonds to the amount at their face value of $2,134,000;

AND, WHEREAS, by Act of Congress entitled "An Act "making appropriations to supply deficiencies in the "appropriations for the fiscal year ending June "thirtieth, eighteen hundred and ninety-eight, and for "prior years and for other purposes," approved July 7, 1898, it was among other things provided as follows, viz.: "That the Secretary of the Treasury, the Secretary of "the Interior, and the Attorney General, and their suc- "cessors in office, be, and they are hereby, appointed "a commission with full power to settle the indebted- "ness to the Government growing out of the issue of "bonds in aid of the construction of the Central "Pacific and Western Pacific bond-aided railroads, "upon such terms and in such manner as may be "agreed upon by them, or by a majority of them, and "the owners of said railroads: *Provided*, that any and "all settlements thus made shall be submitted in writ- "ing to the President for his approval or disapproval, "and unless approved by him shall not be binding."

"That said commission shall not agree to accept a "less sum in settlement of the amount due the United "States than the full amount of the principal and in-

"terest and all amounts necessary to reimburse the "United States for moneys paid for interest or other- "wise. *And also provided*, That said commission are "hereby empowered to grant such time or times of "payment by installment, and at such rates of interest, "to be not less than three per centum per annum, "payable semi-annually, and with such security as to "said commission may seem expedient. *Provided*, "*however*, That in any settlement that may be made "the final payment and full discharge of said indebt- "edness shall not be postponed to exceed ten years, "and the whole amount, principal and interest, shall "be paid in equal semi-annual installments within the "period so limited, and in any settlement made it shall "be provided that if default shall be made in any pay- "ment of either principal or interest or any part "thereof then the whole sum and all installments, "principal and interest shall immediately become due "and payable, notwithstanding any other stipulation "of said settlement: *Provided, further*, That unless the "settlement herein authorized be perfected within one "year after the passage of this Act, the President of "the United States shall at once proceed to foreclose "all liens now held by the United States against said "railroad companies and to collect the indebtedness "herein sought to be settled, and nothing in this Act "contained shall be held to waive or release any right, "lien, or cause of action already held by the United "States.

"That there is hereby appropriated out of any "money in the Treasury, not otherwise appropriated, "the sum of twenty thousand dollars to defray the "expenses of said commission in making the said "settlement."

AND, WHEREAS, it has been agreed by and between the Commission appointed by said Act and the owners of the railroads above described, that the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads should be settled upon the terms and in the manner hereinafter agreed

to, subject to the approval of the President of the United States as provided in said last-mentioned Act.

AND, WHEREAS, Messrs. Speyer & Company, from time to time negotiated the sale of large amounts of the bonds secured by mortgage upon the railroads of the Central Pacific Railroad Company above mentioned, and are desirous of co-operating in a settlement of all matters relating to or affecting the indebtedness of said Company and the adjustment of its affairs.

AND, WHEREAS, of the First Mortgage Bonds of the Central Pacific Railroad Company of California secured upon the bond-aided lines above mentioned, and amounting in the aggregate, at their face value to twenty-five million eight hundred and eighty-one thousand dollars ($25,881,000), there have been already deposited and still remain on deposit subject to the order of Messrs. Speyer & Company, bonds to the amount at their face value of twenty-five million six hundred and thirteen thousand dollars ($25,613,000) under a Bondholders Agreement, dated August 14, 1897, a copy whereof has been furnished to the party of the first part hereto.

AND, WHEREAS, of the Central Pacific Railroad Company's Fifty-Year Five Per Cent. Bonds, issued under the mortgage to the Metropolitan Trust Company of the City of New York, dated April 1, 1899, above mentioned, amounting in the aggregate (after deducting said bonds so as aforesaid held as security for the said Land Bonds), to the sum of ten million two hundred and forty-five thousand dollars ($10,245,000), there have been deposited and still remain on deposit subject to the order of Messrs. Speyer & Company, bonds to the amount, at their face value, of eight million six hundred and eighty-six thousand dollars ($8,686,000) under a Bondholders Agreement, dated October 1, 1897, a copy whereof has been furnished to the party of the first part hereto.

AND, WHEREAS, the owners of the bonds deposited under each of the aforesaid agreements of August 14, 1897, and October 1, 1897, have thereby authorized Messrs. Speyer & Company, in their behalf, to nego-

tiate with any other committees or representatives of holders of other securities of said Railroad Company, or with the Government of the United States, or otherwise, for participation in respect of the deposited bonds in any plan of readjustment or reorganization, or otherwise.

AND, WHEREAS, there have been deposited with Committees consisting of F. G. Banbury, M. P., John B. Akroyd, Lord Alwyne Compton, M. P., Daniel Marks and Joseph Price, in London, and August Belmont, Hon. John G. Carlisle and George Coppell, in New York, under agreements, copies of which have been furnished to the party of the first part, certificates of the Capital Stock of the Central Pacific Railroad Company, to the amount, at their face value, of at least thirty-eight million four hundred and one thousand eight hundred dollars ($38,401,800) out of a total outstanding Capital Stock of said Company, amounting, at its par value, to sixty-seven million two hundred and seventy-five thousand five hundred dollars ($67,275,500), and the said Committees have authorized and requested the said Speyer & Company to negotiate, on their behalf, with the Commission appointed by the act of Congress, of July 7, 1898, above referred to, the basis of a settlement under and in pursuance of the said Act of the indebtedness to the United States growing out of the issue of bonds in aid of the construction of said Central Pacific and Western Pacific bond-aided railroads above mentioned:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, That, in consideration of the premises, the parties hereto have undertaken, covenanted and agreed, and do hereby undertake, covenant and agree, to and with each other as follows, that is to say:

That the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads shall be, and it hereby is, settled upon the terms and in the manner following, that is to say:

FIRST.

The amount due the United States, being the full amount of the principal and interest, and all amounts necessary to reimburse the United States for moneys paid for interest or otherwise, is hereby found and agreed to be, on the day of the date of this agreement, the sum of fifty-eight million eight hundred and twelve thousand seven hundred and fifteen dollars and forty-eight cents ($58,812,715.48).

SECOND.

Within thirty days after this settlement shall become binding, by the submission thereof in writing to the President, and his approval thereof, the Central Pacific Railroad Company shall deliver to the Treasurer of the United States its twenty promissory notes, bearing even date herewith, payable respectively on or before the expiration of each successive six months for ten years, counting from the date of this agreement, each note being for one-twentieth of the foregoing sum of $58,812,715.48, and bearing interest at the rate of three per cent. per annum, payable semi-annually.

Provided, however, that if default shall be made in any payment of either principal or interest of any of said notes or any part thereof, then all of said notes then outstanding, principal and interest, shall immediately become due and payable, notwithstanding any other stipulation of this agreement of settlement.

Each of the said notes shall be in the following form, viz.:

$2,940,635.78.

SAN FRANCISCO, CAL., February 1, 1899.

On or before the Central Pacific Railroad Company will pay to the order of the United States of America two million nine hundred and forty thousand six hundred and thirty-five 78/100

dollars, with interest meantime at the rate of three per cent. per annum, payable semi-annually, for value received.

This is one of a series of twenty notes given by said Railroad Company to the United States of America, each for the same principal sum and bearing interest at the same rate but maturing at different dates, that is to say, on or before the expiration of each successive six months for ten years counting from the date hereof. If default shall be made in any payment of either principal or interest of any of said notes or any part thereof, then all of said notes then outstanding, principal and interest, shall immediately become due and payable.

THIRD.

The payment of principal and interest of the said notes and of the indebtedness represented thereby, shall be secured by the pledge of $58,820,000, face value, First Refunding Mortgage Four Per Cent. Gold Bonds issued by the Central Pacific Railroad Company, or its successor company having title to the aforesaid railroads, such bonds to be part of an issue hereinafter described not exceeding $100,000,000 in all, one-twentieth part of such pledged bonds to be held as security for each of said notes.

FOURTH.

The said Refunding Bonds so to be pledged as security for the payment of the said notes and interest shall be delivered to the Treasurer of the United States within a reasonable time after this settlement becomes binding, for obtaining the deposit of securities, the assent of security owners and the carrying out of such plan of reorganization or readjustment as may be necessary to enable the Central Pacific Railroad Company, or its successor company, to issue said Refunding Bonds and make the mortgage to secure the same a valid lien upon the railroads aforesaid in ac-

cordance with the requirements herein expressed. A period of ten months from the delivery of said notes is hereby declared to be *prima facie* such reasonable time, but the Central Pacific Railroad Company agrees to use its best efforts to perfect such mortgage and deliver such bonds before the expiration of that time; and, on the other hand, should such reorganization or readjustment be delayed by the pendency of judicial proceedings for the purpose of enabling the company which is to make the new mortgage to execute and deliver Refunding Bonds secured as provided herein or be delayed by adverse litigation, such period is to be correspondingly extended; provided, however, that such period shall not be extended for any cause whatever for more than three years from the date of this agreement, except with the written approval of the President of the United States.

If default shall be made in the delivery of the said bonds so to be pledged within the period hereinabove prescribed for such delivery thereof, including any extension which there may have been under the foregoing provisions, then the whole amount of the said notes then outstanding, principal and interest, shall immediately become due and payable.

The said First Refunding Mortgage Four Per Cent. Gold Bonds referred to in Article Third and this Article of this Agreement are to run for at least forty-five years, and to bear interest at the rate of four per cent. per annum, payable semi-annually, and are to be payable, principal and interest, in gold coin of the United States and are to be a part of an issue not exceeding one hundred million dollars face value secured by mortgage upon all the railroads, equipment and terminals now owned by the Central Pacific Railroad Company. Such mortgage shall be the first lien upon the said railroads, equipment and terminals, or shall be secured by deposit as collateral security therefor of at least ninety per cent. of the now outstanding First Mortgage Bonds of the Central Pacific Railroad Company of California and Western Pacific Railroad Company referred to in paragraphs First, Second and Third in the recitals to this

agreement describing the mortgages and liens on "Bond-Aided Lines," and of at least seventy-five per cent. of the aggregate of all now outstanding bonds of the Central Pacific Railroad Company and of all now outstanding bonds of the divisional companies by the consolidation whereof it was fo med, including such First Mortgage Bonds of the Central Pacific Railroad Company of California, and Western Pacific Railroad Company. In making such computation as to the amount of deposited bonds, it is agreed that the $2,038,000 Fifty-Year Five Per Cent. Bonds held as security for the outstanding Land Bonds, as above stated, shall not be counted as outstanding bonds. If any of the mortgages now securing any of the outstanding bonds aforesaid (other than the mortgage securing the Land Bonds, dated October 1, 1870, above referred to) shall be satisfied and discharged, such satisfaction and discharge thereof shall be deemed to be the equivalent of the deposit of all outstanding bonds now secured thereby as security for the said Refunding Bonds. The satisfaction and discharge of the said mortgage securing the Land Bonds, dated October 1, 1870, shall be deemed to be the equivalent of the deposit as security for said Refunding Bonds of all bonds now secured by that mortgage; provided, that the $2,038,000 Fifty-Year Five Per Cent. Bonds held as security for such Land Bonds shall either be canceled or deposited as security for such Refunding Bonds.

The mortgage securing such Refunding Bonds shall be prior in lien to any lease of the railroads of said Central Pacific Railroad Company or their appurtenances or any portion thereof, and shall be in the form agreed upon by the parties hereto, and now identified by the signature of the Attorney-General of the United States, unless the form thereof should be hereafter modified with the consent of the Attorney-General of the United States and the party of the second part, or its successor company, and the party of the third part hereto.

Upon the satisfaction of record of any existing mort-

gage any securities or funds held in any sinking fund created or existing by or under any such mortgage shall be surrendered to the Railroad Company or its successor company.

The lands granted to the Central Pacific Railroad Company of California and to the California and Oregon Railroad Company as above stated are not to be covered by the mortgage securing such Refunding Bonds. Until the delivery to the Treasurer of the United States of the Refunding Bonds to be pledged to it under Article Third hereof, secured as aforesaid, all rights of the United States in respect to said granted lands shall remain in full force and effect, but shall not be enforced unless the Central Pacific Railroad Company, or its successor company, shall make default under this agreement; and upon such delivery of said Refunding Bonds secured as aforesaid, all rights, interest and claims of the United States in, to, and in respect to, such lands shall cease and determine.

From time to time, as the principal or any part of the principal of said notes shall be paid, the United States or other holders of said notes shall return to said Railroad Company or its successors an equal amount at their face value of the said Refunding Bonds with all unmatured coupons appertaining thereto; and, as interest shall be paid upon said notes, the United States or other holders of said notes shall detach and return to said Railroad Company or its successors the coupons appertaining to said bonds representing interest thereon to the date to which interest shall have been paid upon said notes, which coupons shall thereupon be forthwith canceled.

FIFTH.

Until the Refunding Bonds hereinbefore provided for secured as aforesaid shall have been delivered to the Treasurer of the United States as security for the said notes, the lien in favor of the United States, reserved in the acts of Congress above mentioned to secure the repayment to the United States

of the above-mentioned indebtedness, as such lien now exists, shall remain in full force and effect to the extent of such indebtedness as security for the notes representing such indebtedness; and nothing herein contained shall be deemed to prevent the United States from intervening for the protection of its said lien in any legal proceedings brought to foreclose any lien on said railroads or any part thereof or otherwise.

When the Central Pacific Railroad Company or its successor company shall have delivered to the Treasurer of the United States said Refunding Bonds secured as aforesaid, then the lien in favor of the United States above referred to, as then existing, shall immediately vest in, and it is hereby, upon the happening of that event, transferred to, the Trustee of the mortgage securing such Refunding Bonds as security for the entire issue of such bonds.

SIXTH.

Until the notes to be given by the Central Pacific Railroad Company under Article Second of this agreement shall have been paid in full, principal and interest, all amounts due to the Central Pacific Railroad Company or its successor company from the United States subsequent to the date of this agreement in respect of services to the United States, upon the bond-aided lines from a point about five miles west of Ogden to Sacramento and from Sacramento to San José above referred to shall, as audited and allowed, be applied by the United States *pro rata* on account of the amounts remaining unpaid on such notes as shall not have been purchased by Messrs. Speyer & Co. hereunder, such application being first made to the payment of accrued interest thereon and thereafter on account of the principal thereof.

SEVENTH.

Messrs. Speyer & Company, within one month after the delivery to the United States of the notes referred

to in Article Second hereof, will, against delivery to them of the four earliest maturing notes, endorsed to their order by the Secretary of the Treasury on behalf of the United States without recourse to it, pay to the United States the face value of said notes, viz: Eleven million seven hundred and sixty-two thousand five hundred and forty-three dollars and twelve cents, ($11,762,543.12) with accrued interest thereon to date of payment. From and after the time when such payment shall have been made by Messrs. Speyer & Company, they shall, until the delivery of such Refunding Bonds, be entitled to share *pro rata* with the United States in the lien and all proceeds of the lien in favor of the United States to secure the indebtedness above referred to. Upon delivery of the said Refunding Bonds, Messrs. Speyer & Company shall be entitled to receive such Bonds to the amount, at their face value, of the principal of said notes then remaining unpaid which are then held by said Speyer & Company.

Within ten days after the maturity of each of said notes held by Messrs. Speyer & Company, the said Speyer & Company shall notify the Secretary of the Treasury of the United States whether such matured note and the matured interest on all the notes held by them have been paid to them or not.

Until the Refunding Bonds hereinbefore provided for secured as aforesaid shall have been delivered to the Treasurer of the United States as security for the said notes, all rights of the United States in or to or in respect of the said lien, and in or to or in respect of the lands granted as aforesaid, shall remain unaffected by the transfer of the said notes to Speyer and Company, and all right and title of the United States in the said lien, and in respect of the said lands, shall be deemed to continue in the United States as fully as if the said notes remained in its possession and ownership, save only that the said right and title shall be deemed to be held by the United States for the *pro rata* benefit of itself and said Speyer and Company, and the United States may bring and maintain any and all actions, suits and proceedings which it might have

brought or maintained, and may do any and all acts and things which it might have done had all the said notes remained in its possession and ownership, provided that all recoveries, benefits and advantages derived or obtained through or by means of such actions, suits, proceedings and acts for the enforcement of such lien and rights, shall inure to the *pro rata* benefit of the United States and said Speyer and Company. In case of any default in payment of the principal or interest of any of said notes, the United States will thereupon proceed for the enforcement of the said lien.

IN WITNESS WHEREOF, this agreement has been executed on behalf of the United States of America by Honorable Lyman J. Gage, Secretary of the Treasury, Honorable Cornelius M. Bliss, Secretary of the Interior and Honorable John W. Griggs, Attorney-General, appointed by the Act of Congress a Commission as hereabove stated; by the Central Pacific Railroad Company by its President and under its corporate seal attested by its Secretary; and by Messrs. Speyer & Company under their hands the day and year first above written. Executed in triplicate.

LYMAN J. GAGE,
*Secretary of the Treasury.*
CORNELIUS N. BLISS,
*Secretary of the Interior.*
JOHN W. GRIGGS,
*Attorney General.*

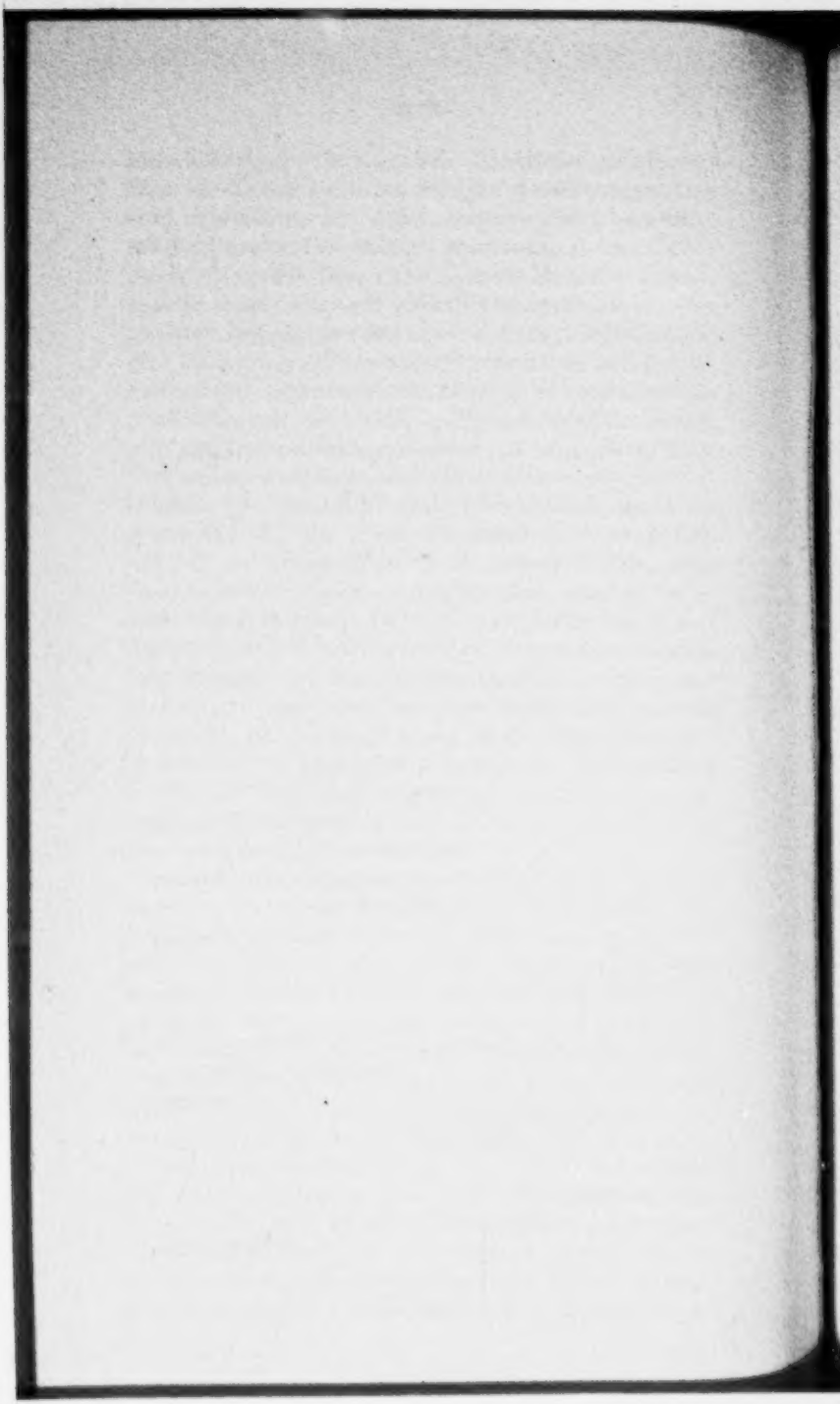
Approved:
WILLIAM MCKINLEY.

CENTRAL PACIFIC RAILROAD COMPANY.
BY ISAAC L. REQUA,
*President.*

{Central Pacific Railroad Company Seal.}

Attest:
W. M. THOMPSON,
*Secretary.*

SPEYER & CO.



# Supreme Court of the United States.

No. 460.—October Term, 1904.

Hiram Remington, Plaintiff in Error, vs. Central Pacific Railroad Company. } In Error to the Circuit Court of the United States for the Northern District of New York.

[April, 17, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to the Circuit Court upon a judgment dismissing the action for want of jurisdicton of the defendant. That question is certified from the Court below.

The action was brought in the Supreme Court of the State of New York on April 10, 1903, by serving a summons on a director of the defendant in error, the railroad. On April 22 the plaintiff's attorney gave twenty days additional time to the defendant in which to appear generally or specially or to move to vacate the summons. On May 11 a firm of lawyers gave notice of a motion to set aside the service, and also that they appeared only for that purpose. An agreement was made giving the defendant time to appear after the motion was decided. The motion was not decided until September 28, 1903, when it was denied and an order to that effect was entered on October 2. The defendant's attorneys filed a notice of appeal on October 15, and the next day gave notice of a motion to stay proceedings on the order, to be made on October 24. On the same October 16 the plaintiff made an affidavit in which it appeared that the sum which he sought to recover was more than $2,000. This contained the first definite notice to defendant, as no declaration had been filed. An order to take plaintiff's deposition and this affidavit were served on the defendant on October 23. On October 26 a petition for removal to the United States Circuit Court was presented by the defendant to a judge of the State Court in Chambers and the bond was approved. Before the petition for removal was filed the motion for a stay came up on October 24 in the State Court and was argued, and a stay was ordered, the defendant at the same time being relieved from any default in appearing. The matter of the appeal was not passed upon. This order was entered on October 26. On November 4 the record was filed in the United States Court.

In the Circuit Court the defendant renewed its motion to set aside the service of the summons, the plaintiff objecting on various grounds, which will be dealt with, and moving to remand the case. On July 23, 1904, the Court granted the defendant's motion and overruled the plaintiff's, and on August 30 a judgment was entered dismissing the action for want of jurisdiction of the defendant. See *Wabash Western Ry.* v. *Brow*, 164 U. S. 271. The plaintiff's rights were saved by a bill of exceptions, the form of the judgment and a certificate of the judge, and the case now is brought here.

It is objected by the defendant that this Court has not jurisdiction, on the ground that it does not appear that the want of jurisdiction of the Court below as a Federal Court was the ground of the judgment. But it appears clearly that the ground of the judgment was the absence of service on the defendant, and that the plaintiff denied the validity of the attempt to remove. See *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 284, 285, and cases cited. The former question was decided to be subject to review on error by this Court in *Shepard* v. *Adams*, 168 U. S. 618. That case has not been overruled. The latter question was held also proper to be brought here, in *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92. The jurisdiction of this Court must be sustained.

Coming then to the motion to remand it is said that the petition to remove was filed too late, because the time for answer had expired. It would be a strong interpretation of the New York Code of Civil Procedure, § 418, to say that it requires an answer within twenty days after the summons when no complaint or even notice stating the sum of money for which judgment will be taken, § 419, has been served. See *Dancel* v. *Goodyear Shoe Machinery Co.*, 106 Fed. Rep. 551. But it is a sufficient reply to the motion and to the objection to the removal that the petition was filed as soon as the case became a removable one. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U S. 92. *Kansas Surburban Belt Ry.* v. *Herman*, 187 U. S. 63, 67, 68. The suggestion that the defendant was estopped by the fact that it followed up its motion to stay in the State Court in accordance with its notice, on October 24, when the right to remove had been made to appear the day before, seems to us too technical, supposing it to be open here. Indeed it was a proper preliminary in one respect. The order made on that motion was "that the defendant be relieved from any default in appearing herein, and that all proceedings on the part of the plaintiff be stayed, pending said appeal and until ten days after the decision thereof, except" an order for the examination of the plaintiff. It did not estop the defendant from insisting on a substantial right that it got rid of a purely formal objection which still is pressed—in our opinion without ground. *Dancel* v. *Goodyear Shoe Machinery Co.*, 106 Fed. Rep. 551.

The order did not take effect until October 26. *Wilcox* v. *National Shoe & Leather Bank*, 67 App. Div. 466. *Hastings* v. *Twenty-third Ward Land Improvement Co.*, 46 App. Div. 609. *Vilas* v. *Page*, 106 N. Y. 439, 455.

It is urged that the petition did not justify removal, because the allegation that the time had not arrived at which the defendant was required to answer or plead was an allegation of a conclusion of law. Allegations which involve such conclusions import that the facts which justify them are true. Many such allegations are permitted to avoid an intolerable prolixity on matters not likely to be controverted. *Haskell* v. *Merrill*, 179 Mass. 120, 123. *Alton* v. *First National Bank of Webster*, 157 Mass. 341, 343. *Commonwealth* v. *Clancy*, 154 Mass. 128, 132. *Windram* v. *French*, 151 Mass. 547, 551. Evans, Pleading, (1st ed.) 48, 139, 143–146, 149–157, 164. The facts appeared of record. When the defendant expected the plaintiff to demand more than $2,000 is immaterial. The only material point is when the demand was stated in the case. Assuming the objection to be open here, if there was any defect, which we do not imply, it was but a defect of form. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92, 98, 101. The presenting of the petition to a judge in chambers, and the filing of it in the State Court, satisfied the statute. See *Noble* v. *Massachusetts Benefit Association*, 48 Fed. Rep. 337. *Loop* v. *Winters' Estate*, 115 Fed. Rep. 362.

We come then to the setting aside of the summons. We assume, for purposes of decision, as we already have assumed, that *Shepard* v. *Adams*, 168 U. S. 618, is consistent with the decisions that the jurisdiction of the Circuit Court as a Federal Court only is in question. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225. *Bache* v. *Hunt*, 193 U. S. 523. *Courtney* v. *Pradt*, 196 U. S. 89. If there has been no valid service the court has no power, and a distinction is possible between such a case and a mere question touching the proper limits between equity and law, or the traditional authority of the Court. We leave *Shepard* v. *Adams* as we find it, since a reconsideration of the point is not necessary to decide the present case. It is said that the decision of the State Court, although appealed from, was *res judicata*. But it stood no higher than a similar decision made by the Circuit Court, if the case had been begun before that Court. It may be that the defendant would have had no right to renew its motion, but the Circuit Court would have had power to give it leave. If the Circuit Court was satisfied that it, or its predecessor the State Court, had made a mistake, it had power to reopen the matter. It did so and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule.

The plaintiff in error does not argue the merits of the order of the Circuit Court. Assuming that they, as well as the jurisdiction of the Court

to make the order, are open here, we see no sufficient reason for disturbing the decision. The Circuit Court was warranted by the affidavits before it in finding that the defendant was doing no business and had no property in the State of New York, and that the service on a director casually within the State for a few days was bad. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406. *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428. The arguments do not seem to us to need to be noticed in greater detail.

*Judgment affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*